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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1648

TRIBUNE PUBLISHING COMPANY and
JAMES E. SHERLEDY, *Petitioners*,

v.

MICHAEL A. CALDERO, *Respondent*.

IN RE SHERLEDY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Idaho entered on March 4, 1977.

OPINIONS BELOW

The District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, rendered no opinion. The opinion of the Supreme Court of the State of Idaho, not yet officially reported, is set forth in Appendix A.

JURISDICTION

The judgment of the Supreme Court of the State of Idaho was made and entered on March 4, 1977. The petition of Tribune Publishing Company and James E. Shelledy for a rehearing was denied on April 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the decision of this Court in *Branzburg* v. *Hayes* mandates that a court order disclosure of a confidential news source in civil litigation without first analyzing and balancing the competing constitutional interests involved.

2. Whether a state court in a civil action, consistently with the First Amendment protection extended to newsgathering, may order the disclosure of the identity of a news reporter's confidential source without an express finding by the court (a) that the information sought is relevant to the underlying civil litigation; and (b) that the information sought from the reporter is unavailable from other sources; and (c) that the information sought is of such critical importance to the plaintiff's case as to override the invasion of First Amendment interests occasioned by its disclosure.

3. Whether a trial court, prior to ordering disclosure (coerced by contempt) of a confidential news source, must consider alternative remedies less destructive of First Amendment rights.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment I

"Congress shall make no law . . . abridging the freedom . . . of the press; . . ."

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

STATUTES INVOLVED

"All persons, without exception, otherwise than is specified at the next two sections, who, having organs of sense, can provide, and perceiving, can make known their perception to others, may be witnesses." Idaho Code § 9-201.

"A witness, served with a subpoena, must attend at the time appointed, with any papers under his control, required by the subpoena, and answer all pertinent and legal questions, and, unless sooner discharged, must remain until the testimony is closed." Idaho Code § 9-1301.

STATEMENT OF THE CASE

Petitioners herein, Tribune Publishing Company and James E. Shelledy, seek review of the judgment of the Supreme Court of the State of Idaho upholding an order, judgment, and sentence of and for contempt resulting from a newsman's refusal to disclose the identity of a confidential source whose reported opinion was neither defamatory nor indicative of "actual malice." The plaintiff below, Michael Caldero, instituted an action in libel, later amended to include a count alleging invasion of privacy, against the Tribune Publishing Company and James E. Shelledy based on an article printed in the November 23, 1973, issue of the Lewiston Tribune. The substance of the complaint was that the article contained "an unfair, false and malicious account" of an incident involving Caldero

while he was employed as an undercover agent for the Idaho Bureau of Narcotic Enforcement.

The article described, in detail, an incident on August 27, 1972, when Caldero and another agent were in a public park in Coeur d'Alene, Idaho, and in the process of an arrest of one Booth who had attempted to sell them narcotics. Booth was in the company of one Johnson, and when an altercation ensued between Booth and the two agents, Johnson attempted to leave the scene in an automobile. Although the precise facts are in dispute, it is agreed that Caldero fired three shots through the windshield of the Johnson-driven vehicle, two of which struck and injured Johnson.

The Tribune article in question appeared more than a year after the event under the by-line of Jay Shelledy and had as its focus the professional propriety of Caldero's conduct. Caldero claimed that "he fired in self defense; that Johnson tried to run him down." In the article, Caldero's assertion was contrasted with statements from eye witnesses and general observations from the county prosecutor and the state attorney general. Additionally, the article contained the opinion of an undisclosed "police expert" as follows:

> "One police expert, in an off-the-record interview with the Tribune, said Caldero's justification for shooting didn't add up. His reasoning was derived mainly from logistical facts:
>
> "—It was more than 90 minutes after sundown, so the lighting was too poor to see Caldero's small wallet badge at a distance greater than a few yards.
>
> "—The distance between Caldero and Johnson's car when Johnson pulled out of the parking stall was not sufficient for the vehicle to have picked up

> much speed, especially since the tires were not getting traction in the loose gravel. Even the slowest agent could have stepped out of the way, unless he was determined to throw himself in front of the car to physically stop it. (Witnesses estimate the speed of the car at less than 10 m.p.h. when the shots were fired.)
>
> "Caldero didn't have time to pull out his gun while running toward the car, dig out his wallet and show his badge, get out of the way of the car, replace his wallet and fire three shots with both hands on the gun as police are taught to fire.
>
> "The position of the bullet holes and angle at which Johnson was hit put Caldero adjacent to the left tire when he fired. Therefore, the car had missed him and he was in no apparent danger and in good position to shoot the tires out if he felt he had to fire his gun.
>
> "But Booth's sale and Johnson's accomplice's role were not 'shooting' offenses. Caldero's only justification would be to maintain his life was in grave danger. Otherwise, it would be a case of a young policeman who panicked, or who became carried away."

During the course of discovery in the Caldero lawsuit, the newsman Shelledy was desposed and questions were directed to him by Caldero's attorney pertaining to the portion of the article relating to the opinion of the "police expert." Shelledy refused to answer those questions which would, in his opinion, either reveal or lead to the identity of the source of the information.

Thereafter, Shelledy was added as a party-defendant to the action. Subsequently, Caldero filed a Motion to Compel Answers to Questions-Oral Examination against Shelledy, and the defendants filed a motion for

summary judgment. Both motions were briefed, orally argued, and submitted simultaneously for determination by the lower court. During the hearing on those motions the court orally advised that it had concluded that Caldero was, in fact, a "public official" or "public figure", thereby requiring that actual malice be shown as a condition precedent to establishing a prima facia case under the doctrine of *New York Times* v. *Sullivan,* 376 U.S. 254 (1964). The court reserved action on the defendant's motion for summary judgment but did state that it would have granted the motion due to a lack of proof or showing of actual malice had it not been for the plaintiffs' motion to compel disclosure.

The court did grant the plaintiff's motion to compel answers; however, the granting of the motion was limited and the court entered an order which directed Shelledy to appear and answer only three questions:

"1. Who is the person identified as the 'police expert' in the subject article?

2. What was the time and place of the conversation between the deponent and the police expert?

3. What did the police expert say, and what information did the police expert relate to the deponent, during the conversation or any other?"

Shelledy was again deposed and with respect to questions 2 and 3 of the court order, he indicated that the conversation took place by telephone approximately ten days prior to publication of the article. Shelledy stated that he had explained to his anonymous source the circumstances surrounding the shooting incident as they had been revealed by his investigation, and the anonymous source opined that under those circum-

stances, in retrospect, Caldero's life was not in danger at the time of the shooting. Certain collateral questions which were put to Shelledy were rejected by the District Court as being beyond the scope of its order.

Upon being asked the identity of the police expert, Shelledy read a statement declaring his refusal to answer and stating that he based such refusal upon the First Amendment to the United States Constitution and his professional code of ethics. Upon Shelledy's continued refusal to reveal the identity of the police expert, and after he had been advised of the consequences of his conduct, Shelledy was judged in contempt and ordered incarcerated for a period of 30 days, at the end of which time he was to be reexamined by the court with regard to the identity of the police expert and "given an opportunity to remove his contempt." That order, and the execution of the judgment thereunder, was stayed pending appeal to the Supreme Court of the State of Idaho. The District Court's Order of April 23, 1975, further provided that the ruling on defendant's motion for summary judgment, which had been fully submitted to the court for determination, was also to be stayed pending appeal to the Supreme Court of the State of Idaho.

On appeal, the Supreme Court of the State of Idaho affirmed in a three to two decision. The majority briefly reviewed the Idaho statutes pertaining to witnesses and the requirements of testimony and concluded that those statutes did not excuse Shelledy from testifying nor recognize the newsman's asserted privilege. Addressing itself to the First Amendment issue, the majority outlined what it conceived to be the question before it:

"We come then to appellant's major contention that he cannot be compelled to disclose the infor-

> mation sought here because of the freedom of the press guaranteed by the First Amendment to the Federal Constitution. It is argued that the disclosure of information acquired by a newsman from a confidential source would have a "chilling effect" on the ability of newsmen to utilize confidential sources and thus inhibit the media's ability to gather news and inform the public, all in violation of the First Amendment guaranty." Appendix A at 7a-8a.

The majority noted that in *Garland* v. *Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958), the Second Circuit Court of Appeals considered the argument, first, "that a newsman has an absolute privilege against disclosure of confidential sources . . . , and, secondly, that at least in certain circumstances a confidential news source is protected by a qualified privilege." Appendix A at 8a. The majority proceeded to note that "[w]e read the opinion of [the court] as rejecting both alternatives." Id.

The Idaho Supreme Court then proceeded to address and place primary reliance upon this Court's decision in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972). While noting that *Branzburg* was "cast in the criminal area", the majority nevertheless, found "certain language therein to be of guidance." Appendix A at 10a. After a review of some of that language, the majority then indicated that its "reading of *Branzburg* v. *Hayes* is to the effect that no newsman's privilege against disclosure of confidential sources founded upon the First Amendment exists in an absolute or qualified version." Id. at 13a.

Finally, the court endorsed or distinguished various state and federal court decisions concerning the existence and/or extent of a constitutionally based privilege and affirmed the order, judgment, and sentence of the trial court, stating that it "cannot accept the premise that the public's right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public." Appendix A at 22a.

In a sharply worded dissenting opinion, Justice Donaldson, noting that "there is some doubt that the majority believes First Amendment freedoms are even implicated", criticized the majority opinion for its failure to expressly address the issue of competing interests "in this First Amendment case [which] necessarily involves a balancing of competing interests." Appendix A at 23a. He stated that the two interests here involved—"the interest in allowing the press unfettered access to sources of information and the interest in allowing courts unimpaired access to testimony *in civil litigation*"—cannot be resolved "by stating the general theory that new testimonial privileges are disfavored or by stating the importance courts have traditionally placed on compelling testimony in a lawsuit." *Id.* at 23a. Justice Donaldson also discounted the precedential value, in civil litigation, of *Branzburg.* He emphasized that *Branzburg* was decided in the context of a criminal grand jury investigation, and that Justice Powell's decisive concurring opinion in the 5-4 decision, by recognizing that "sources are privileged under certain circumstances, . . . *does establish a qualified privilege.*" *Id.* at 29a, n.3 (emphasis added).

Justice Donaldson's dissenting opinion then reviews various cases in which newsmen have been subpoenaed to testify in civil litigation and notes that their "basic theme . . . is that news-gathering should enjoy a qualified privilege", wherein "courts would compel

disclosure only when the plaintiff could show that the identity of the source was critical to his case." *Id.* at 37a.

Applying these principals to the instant case, Justice Donaldson found no basis for compelling disclosure of the identity of Shelledy's confidential source:

> "Caldero . . . has made no showing that he attempted to obtain the identity of Shelledy's source by alternative means less destructive of first amendment freedoms. . . . [Moreover,] Caldero has not even come close to establishing the critical importance of Shelledy's testimony. Shelledy's undisclosed source merely expressed an opinion about the professional propriety of Caldero's conduct that was echoed by the county prosecutor and the state attorney general, both of whom were identified in Shelledy's article. . . . . The statements themselves do not evince any inference of malice. . . . Caldero's claim, moreover, is not supported by any other evidence. As stated earlier, the only relevance that the identity of the source has in *Caldero* is that an inference of malice would arise if the source was either nonexistent or irresponsible. Critical importance cannot be established on such a meager basis. The identity of a source could be of critical importance only if plaintiff's allegations already had some basis in fact before disclosure. Then the identity of the reporter's source could have the pivotal importance envisioned by *Garland* and its progeny." Appendix A at 38a.

In a separate dissenting opinion, Justice Bakes disputed the assertion in the majority opinion that the First Amendment does not afford a limited privilege protecting newsmen from discovery of their confidential sources. He noted that even in those civil cases

where discovery ultimately was ordered, a balancing of the First Amendment protection of newsgathering against the right of litigants to discovery of material information was undertaken. Moreover, where disclosure has been ordered, it has not been accorded the breadth and scope which routinely is accorded discovery of non-privileged matters under F.R.C.P. 26(b)(1). This tacit recognition that, by virtue of the First Amendment, discovery pertaining to a confidential news source may not be as broad as discovery ordinarily afforded under F.R.C.P. 26(b)(1), is also evident in the discovery order of the trial court and in the opinion of the Idaho Supreme Court below:

> "[Although] the reporter here was not privileged to refuse to disclose his sources, the scope of the discovery ordered is limited to three questions . . . and the trial court rejected the plaintiff's request for discovery of answers to several collateral questions." Appendix A at 42a.

Justice Bakes' dissenting opinion goes on to note that, were the publication in question actually libelous, discovery of the police expert would, in fact, be critical to the plaintiff's case. Inasmuch as the published opinion of the police expert was clearly speculative, and based upon underlying factual assertions the accuracy of which is not disputed by Caldero, "it cannot be said that the article has defamed Caldero, and therefore the search for actual malice in the publication becomes irrelevant", *Id.* at 45a; and reversal of the district court's order holding Shelledy in contempt is appropriate.

SUMMARY OF ARGUMENT

The decision below lets stand an unwarranted infringement of First Amendment rights in the absence of any showing that there is an overriding state interest justifying such infringement or that there is no other alternative but to require compelled disclosure of a newsman's confidential source. Moreover, in affirming the order of contempt entered by the trial court, not only did the Supreme Court of Idaho err by failing to inquire as to whether entry of such an order constituted an abuse of discretion in these circumstances, but it also failed to determine whether alternative discovery remedies, less destructive of First Amendment interests, might have been utilized.

In addressing the issue as to the existence *vel non* of a qualified newsman's privilege to protect the confidentiality of sources, the Idaho court erroneously interprets the narrow holding of this Court in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972). *Branzburg* held only that, in the context of grand jury proceedings, a newsman could not refuse to divulge information in his possession pertaining to the observation or commission of a crime. Ignoring the limited nature of that opinion, the Supreme Court of Idaho held that, under *Branzburg,* no newsman's privilege existed, in civil litigation, regardless of the surrounding facts and circumstances. Although the Idaho court discussed *Garland* v. *Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958) and its progeny, the court ignored the doctrine, consistently espoused and applied in those cases, that, in civil litigation, a journalist may not be compelled to reveal his confidential sources in the absence of particularized findings that the information sought is 1) relevant to the underlying civil litigation; 2) unavailable from other sources; and 3) of such critical importance to the lawsuit that i goes "to the heart of the plaintiff's claim."

As pointed out in the dissenting opinions below, there is some doubt that the majority even recognizes that First Amendment rights were implicated in the instant case. The majority below recognized that both the Constitution and statutory law grant litigants the right to the testimony of witnesses; however, the court ignored the competing First Amendment rights to protection of newsgathering and confidential sources. Whenever constitutional rights are found to be in conflict, it is essential that a court analyze the competing interests and engage in a balancing test. Prior to determining that one constitutional interest must bow to the other, a court must determine that there is some compelling or overriding state interest which justifies impairment of the constitutional right which is subordinated. The courts applying the *Garland* approach either compelled or refused to compel disclosure of a journalist's confidential source only after they had thoroughly analyzed the facts and circumstances of each case; disclosure was never ordered in those cases except where all three parts of the *Garland*-test had been satisfied, and the court was convinced that the need for the testimony overrode the First Amendment interests at stake.

In the instant case, the Supreme Court of Idaho ignored the fact that, whether the confidential source existed or not, Caldero could not establish a prima facie libel case. At most, non-existence of the source, would have created an issue as to actual malice; however, as noted in the dissenting opinions, the other elements of libel were lacking. In the absence of some basis

in fact for the plaintiff's allegations, the identity of the confidential source could not be of critical importance to plaintiff's case, and the Garland-test therefore could not be satisfied.

Finally, the Idaho court failed to determine whether entry of the contempt order constituted an abuse of discretion by the trial court and whether alternative discovery remedies might have obviated the constitutional confrontation created by the contempt order. Even had compelled disclosure been appropriate in the instant case, the trial court had available to it numerous remedies, other than coercion by contempt, which would have been less destructive of First Amendment rights. The trial court's refusal to consider such remedies was, in itself, an abuse of discretion. Moreover, the significant constitutional interests at stake required the trial court and the Idaho Supreme Court to seek less drastic means by which the objective, ultimately sought, could be more narrowly achieved. *Shelton* v. *Tucker,* 364 U.S. 479 (1960). The importance of disclosure to the plaintiff was not sufficiently critical to justify the impairment of First Amendment rights occasioned by a disclosure order coerced by contempt.

I. THE OPINION BELOW ERRONEOUSLY INTERPRETS THIS COURT'S HOLDING IN BRANZBURG v. HAYES TO REQUIRE DISCLOSURE OF CONFIDENTIAL NEWS SOURCES IN CIVIL LITIGATION

Much of the holding by the majority of the Idaho Supreme Court, affirming the contempt citation of Petitioner Shelledy, is based on their reading of this Court's opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). There "[t]he sole issue before [the Court was] the obligation of reporters to respond to grand

jury subpoenas as other citizens do and to answer questions relvant to an investigation into the commission of a crime." *Id.* at 682. *Branzburg* resulted in a 5-4 decision in which Justice Powell wrote a concurring opinion. Three of the dissenters (Stewart, Brennan, Marshall, JJ) urged the recognition of a qualified "newsman's privilege". Justice Douglas, in a separate dissenting opinion, stated that under the First Amendment, newsmen enjoy an absolute privilege against disclosure of their confidential news sources. In the majority opinion, Justice White (joined by Burger, Blackman, and Rehnquist, JJ), while emphasizing that "news gathering is not without its First Amendment protections", *Id.* at 707, held:

> "On the records now before us, we receive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial." 408 U.S. at 690-91.

Justice White noted, however, that a newsman's obligation to appear and testify before a gand jury is not beyond challenge:

> "Grand jury investigations, if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." 408 U.S. at 707.

In his concurring opinion, Justice Powell acknowledged the general obligation of news reporters to testify before grand juries, even regarding their confidential news sources. Justice Powell, however, ex-

panded the scope of First Amendment protection against disclosure of news sources beyond the situation where a grand jury is being conducted in good faith. He noted that "the asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Id.* at 710. Beyond this requirement that, on a case-by-case basis, the competing interests of disclosure and confidentiality be balanced, Justice Powell stated that a newsman might seek a motion to quash or a protective order whenever he was

> "called upon to give information bearing only a remote and tenous relationship to the subject of the investigation, or if he has some other reason to believe that this testimony implicated confidential news source relationships without legitimate need of law enforcement." *Id.*

Thus, although Justice White's plurality opinion would require that newsmen testify concerning confidential news sources before grand juries, save where the grand jury's investigation is conducted in bad faith, Justice Powell's concurring opinion would accord greater protection against disclosure by requiring, after the competing interests have been weighed, a showing of a sufficiently compelling state interest in disclosure and a showing that the information sought to be disclosed is relevant to the subject of the grand jury's criminal investigation. In these respects, Justice Powell's concurring opinion is similar to Justice Stewart's dissenting opinion, where he urged, as a precondition to disclosure, a showing of: 1) relevance; 2) exhaustion of alternate sources for the information

sought; and 3) a compelling state interest. Thus, the fact that *Branzburg* was decided in the context of a grand jury's investigation of a newsman's actual observation of criminal conduct, and the nature of Justice Powell's special concurring opinion, leaves the precedential value of *Branzburg* in civil litigation very uncertain.

Nevertheless, the Idaho Supreme Court's majority opinion below, while acknowledging that the *Branzburg* decision was "cast in the criminal area", not only found "certain language therein to be of guidance", but interpreted that case to mean "that no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version." (Appendix A at 13a). Such an interpretation is clearly overbroad and has no basis in the language of the opinion itself. Had Justice Powell thought that no qualified privilege should be recognized, or that disclosure was inappropriate only when a grand jury's investigation was not being conducted in good faith, there would have been no reason for his special concurring opinion disfavoring disclosure where the information sought bears "only a remote or tenuous relationship to the . . . investigation", or where the testimony sought would not satisfy a "legitimate need of law enforcement."

Judicial decisions subsequent to *Branzburg* make it clear that that decision should not be accorded the broad deference in civil litigation exhibited by the Idaho Supreme Court. In *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973), a civil libel action wherein plaintiff, the Mayor of St. Louis, sought disclosure of defendant's confidential sources, the Eighth Circuit Court of Ap-

peals emphasized the limited scope of this Court's holding in *Branzburg:*

> "The Court was not faced with and, therefore did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense." 464 F.2d at 993, n.9.

In another civil libel action, *Carey* v. *Hume,* 492 F.2d 631, 635-36 (D.C. Cir., 1974), the District of Columbia Circuit Court of Appeals stated:

> "[A]ppellant was content to present the case to us upon the theory that the First Amendment left no room, under any circumstances, for compelling a newsman to identify his source. That is clearly not the law after *Branzburg* with respect to criminal proceedings, and it appears to us that *Branzburg,* in language, if not in holding, left intact, insofar as civil litigation is concerned, the approach . . . that the court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsmen that the public right to know is impaired."

And, in a footnote:

> "Although it is certainly necessary to consider carefully the emphasis in *Branzburg* upon the public interest in the giving of testimony, we do not believe that it automatically controls this case. This is a civil libel suit rather than a grand jury inquiry into crime, and the dispute over disclosure is between the press and the Government. This difference is of some importance, since the central thrust of Justice White's opinion for the Court concerns the traditional importance of grand juries and the strong public interest in effective enforcement of the criminal law. Justice White also relied on the various procedures available to prosecutors and grand juries to protect informants and on careful use by the Government of the power to compel testimony. Private litigants are not similarly charged with the public interest and may be more prone to seek wholesale and indiscriminate disclosure." 492 F.2d at 636, n.6.

In another civil libel action, *Baker* v. *F & F Investment* 470 F.2d 778 (2d Cir. 1972), *cert. denied,* 411 U.S. 966 (1973), the Second Circuit Court of Appeals directly addressed the weight to be given *Branzburg* in a civil context:

> "Manifestly, the [Supreme] Court's concern with the integrity of the grand jury as an investigatory arm of the criminal justice system distinguishes *Branzburg* from the case presently before us. *If, as Mr. Justice Powell noted in that case, instances will arise in which First Amendment values outweigh the duty of a journalist to testify even in the context of a criminal investigation, surely in civil cases, courts must recognize that the public interest in non-disclosure of journalists' confidential news sources will often be weightier than the private interest in compelled disclosure. . . .*" 470 F.2d at 784-785 (emphasis added).

In accord with this interpretation limiting the scope of *Branzburg's* applicability is the case of *Bursey* v. *United States,* 466 F.2d 1059 (9th Cir. 1972), *reh. denied,* 466 F.2d 1092 (1972). In this case, reporters for the Black Panther Party's newspaper were held in contempt for refusing to answer questions propounded by a federal grand jury. The Ninth Circuit Court of Appeals held that the witnesses could be compelled to answer questions relevant to the subject mat-

ter of the criminal investigation for which the witnesses received immunity. The reporters, therefore, were required to testify concerning the presence of illegal weapons at Panther headquarters and other criminal activity which they may have directly observed. The court held, however, that they were not required to answer inquiries about the identity of persons with whom the witnesses were associated either on the newspaper or in the Black Panther Party itself, even though the answers to these inquiries "might have something vaguely to do with conduct that might have criminal consequences." 466 F.2d at 1091.

In so ruling, the court applied a balancing test requiring, as a precondition to compelled disclosure of the identity of confidential news sources and other associates, a showing of a compelling state interest, relevance, and exhaustion of alternate sources. This decision clearly does not interpret *Branzburg* to mean that, even in the context of a grand jury investigation, "no newsman's privilege . . . exists in an absolute or qualified version." Appendix A at 13a. The court specifically articulated the evidentiary showing necessary to compel disclosure:

> "When the collison [between governmental activity and First Amendment rights] occurs in the context of a grand jury investigation, the government's burden is not met unless it establishes that the government's interest in the subject matter of the investigation is 'immediate, substantial, and subordinating', that there is a 'substantial connection' between the information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining the information is not more drastic than necessary

> to forward the asserted governmental interest." 466 F.2d at 1083.

Moreover,

> "[t]he fact alone that the government has a compelling interest in the subject matter of a grand jury investigation does not establish that it has any compelling need for the answers to any specific questions. The Court must decide whether the government has carried its burden almost question by question before it can compel answers." *Id.* at 1086.

The *Bursey* decision undoubtedly was written prior to this Court's decision in *Branzburg,* for it was released the following day. In its Opinion on the Petition for Rehearing, subsequently filed by the government, the court stated that although "newsgathering was never a real issue here", 466 F.2d 1090, n. 1, the decision in *Branzburg* is applicable and does not dispense with the need for balancing the competing interests on a case-by-case basis:

> First, *Branzburg, Pappas*, and *Caldwell* are not inconsistent with either our reasoning or the result we have reached.
>
> * * *
>
> Although there is some language in Mr. Justice White's Opinion in *Branzburg* (408 U.S. at p. 665, 92 S.Ct. 2646) implying that a grand jury investigation carries with it ingredients that may favor balance for the government as against the First Amendment, the passsage does not purport to disavow the balancing standards enunciated in such cases as *DeGregory* v. *Atty. General of New Hampshire* (1966) 383 U.S. 825, 86 S.Ct. 1148, 16 L.Ed.2d 292; *Gibson* v. *Florida Legislative Investigation Committee* (1963) 372 U.S. 539, 83 S.Ct.

889, 9 L.Ed.2d 929, and *Bates* v. *Little Rock* (1960) 361 U.S. 516, 80 S.Ct. 412, 4 L.Ed.2d 480 . . . . [W]e have concluded that the balance we struck is not impaired by *Branzburg.*" *Id.* at 1091.

Thus, decisions out of the Second, Eighth, Ninth and District of Columbia Circuit Courts of Appeal indicate that the controlling authority of *Branzburg,* in a civil case such as this, is, at the very best, uncertain. As noted below in Justice Donaldson's dissenting opinion, *Branzburg* has not been accorded the weight, even in the criminal context, which it is ascribed by the Idaho Court's majority opinion below. See Appendix A at 25a.

Thus, in a substantial number of civil cases and in at least one notable case involving refusals to testify before a grand jury, the question whether a newsman may be compelled to disclose the identity of a confidential news source is addressed under the approach espoused in Justice Stewart's dissenting opinion in *Branzburg,* whereby the interest in disclosure is specifically balanced against the interest in non-disclosure, and a showing of relevance, exhaustion of alternate sources, and a compelling state interest in the information sought is of significant bearing, if not required. Yet, even a cursory reading of the majority opinion below reveals the complete absence of such particularized balancing. The entire opinion, other than that portion which develops the factual issues in the case, is devoted to a selective reading of all the case law in this area in an attempt to uncover the weight of authority and logic relating to the existence or non-existence of a newsman's testimonial privilege in a civil context. Very little of the opinion relates

the discernible law to the factual record, and there is very little discussion, in the factual context of this case, of any compelling interest in disclosure, relevance or exhaustion of alternate sources. The Idaho Supreme Court merely quotes, without further analysis, the trial court's conclusory discussion of these factors:

> "The District Court opined:
>
> 'I believe . . . *every opportunity to get his case into court must be given to the plaintiff;* and as a consequence of that, I believe that the matter of the *identity of the police expert is material; it's relevant. It goes, if necessary, to the heart or the crux of the plaintiff's case, or may.* On the other hand, that information, when explored, may disclose insufficient information to support the plaintiff's case as against a Motion for Summary Judgment that . . . could be ruled upon if I reserve judgment on your Motion for Summary Judgment.' " Appendix A at 4a. (emphasis added)).

This clearly falls short of the particularized "balance of these vital . . . interests on a case-by-case basis [which] accords with the tried and traditional way of adjudicating such questions." *Branzburg* v. *Hayes, supra,* at 710 (Powell, J., concurring opinion).

The court's opinion below is also contradictory, if not in error, in view of the fact that after concluding that no testimonial privilege of either an absolute or qualified nature exists, the court does not even explain why the trial court specifically rejected Plaintiff's request for discovery of answers to several "collateral" questions and limited its discovery order to three questions. Petitioners respectfully submit that if, as the majority opinion asserts, no absolute or qualified

privilege exists, "there should be no reason why the plaintiff in this case is not afforded the broad discovery given all parties in civil litigation under Rule 26 (b)(1) . . . ." Appendix A at 24a; Bakes, J., dissenting opinion.

II. DISCLOSURE OF A NEWSMAN'S CONFIDENTIAL SOURCE, PURSUANT TO DISCOVERY IN CIVIL LITIGATION, MAY NOT BE COMPELLED IN THE ABSENCE OF FINDINGS THAT THERE DO NOT EXIST ALTERNATIVE MEANS OF OBTAINING THE INFORMATION AND THAT THERE IS A COMPELLING OR OVERRIDING STATE INTEREST WHICH JUSTIFIES DISCLOSURE.

In upholding the order of contempt against Petitioner Shelledy, the Supreme Court of Idaho affirmed the lower court's granting of a motion to compel disclosure of a newsman's confidential source pursuant to discovery in a civil libel suit despite the fact that the lower court totally failed to make any findings as to whether the information sought was available elsewhere or whether such disclosure was mandated by a compelling state interest which would justify the impairment of First Amendment freedoms.

The forced disclosure of newsmen's confidential sources necessarily involves impairment of the First Amendment guarantee of freedom of the press, for such forced disclosure has an inhibitory effect on newsgathering and on the reporting of that news which is gathered:

> Fear of exposure will cause dissidents to communicate less openly to trusted reporters. And, fear of accountability will cause editors and critics to write with more restrained pens.
>
> *Branzburg* v. *Hayes,* 408 U.S. 665, 721 (1972) (Douglas, J., dissenting opinion).

This Court has recognized that "newsgathering," a precursor to the question of disclosure, falls under the protection of the First Amendment as a necessary component of a free press: "nor is it suggested that newsgathering does not qualify for first amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg* v. *Hayes, supra* at 681.

Further, this Court has consistently held that it is an essential precondition to any state regulation or restriction of First Amendment freedoms that there be a compelling state interest sufficient to justify the limiting of First Amendment freedoms. *See, NAACP* v. *Button,* 371 U.S. 415 (1963); *DeGregory* v. *Attorney General of New Hampshire,* 383 U.S. 825 (1966); *NAACP* v. *Alabama,* 357 U.S. 449 (1958).

In *Branzburg* v. *Hayes, supra,* this Court held that a state's interest in "ensuring effective grand jury proceedings," through the compulsion of testimony regarding the observation or commission of criminal acts, was sufficiently compelling to permit the forced disclosure of newsmen's sources. Nevertheless, the Court did acknowledge that such forced disclosure might impose a "consequential, but uncertain, burden on newsgathering," and the Court was careful to strictly limit its holding to situations in which newsmen, before a grand jury, had knowledge of criminal activity.

The instant case falls without the boundaries of the *Branzburg* decision, and, therefore, as suggested by the *Branzburg* majority, must be analyzed according to the particular facts and particular constitutional protections involved. In other words, the rights of a

civil litigant to have the testimony of an individual must be balanced against the First Amendment right of a newsman to refuse to disclose information pertaining to his confidential sources.

The Supreme Court of Idaho totally failed to "balance the competing interests on their merits in [this] particular case," *Branzburg* v. *Hayes, supra* at 710 (Powell, J., concurring opinion), or to make the particular findings necessary to justify impairment of First Amendment liberties. As discussed previously, the Supreme Court of Idaho merely held that, under *Branzburg,* no newsmen's privilege exists in any circumstances. Rather than engaging in the appropriate inquiry into the balancing of the competing interests and the necessity for disclosure, the court below attempted to support its overbroad reading of *Branzburg* by reviewing those cases which, on the particular facts presented, denied an asserted newsman's testimonial privilege and by attempting to distinguish those cases in which, although a proper balancing of the competing interests may have been conducted, disclosure of a confidential news source was not required.

Appropriately, the Supreme Court of Idaho initiates its analysis with a discussion of *Garland* v. *Torre,* 259 F.2d 545 (2d Cir.), *cert. denied,* 358 U.S. 910 (1958). In *Garland,* entertainer Judy Garland, brought a libel action against Columbia Broadcasting System alleging that C.B.S. had "authorized, requested and induced" the publication of false and defamatory statements in newspapers and elsewhere. In an article written in the New York Herald Tribune by Marie Torre, remarks to the effect that Garland was overweight were attributed to an unnamed C.B.S. "network executive." Counsel for Garland then deposed Marie Torre and inquired concerning her source. Miss Torre refused to answer, claiming a First Amendment privilege. She was then held in contempt. This contempt citation was affirmed by the Second Circuit Court of Appeals in a decision written by now Justice Stewart. In assessing this decision, the Idaho Supreme Court notes:

> "The argument was made therein, first, that a newsman has an absolute privilege against disclosure of confidential news sources which is protected by the First Amendment to the Constitution, and secondly, that at least in certain circumstances a confidential news source is protected by a qualified privilege. *We read the opinion of Mr. Justice Stewart as rejecting both alternatives.*"
>
> Appendix A at 8a. (emphasis added.)

Far from deciding that these arguments were untenable, the court in *Garland* merely found no abuse of the trial judge's discretion in refusing to issue a protective order against discovery. Moreover, the *Garland* court accepted "at the outset the hypothesis that compulsory disclosure of a journalist's confidential sources of information may entail an abridgement of press freedom by imposing some limitation on the availability of news." 259 F.2d at 548. Beyond that, the court noted that it was not

> "dealing with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality." *Id.* at 549-550.

The court expressly based its decision upon the fact that "the question asked of the appellant went to the

heart of the plaintiff's claim." *Id.* at 550. This is due to the fact that C.B.S., in its answer, denied that it had made the alleged false and defamatory statements or caused them to be published. Thus, without testimony from the undisclosed source, Garland would have been unable even to establish a threshold element of her case, publication by a defendant. In the instant case, the fact of publication by defendants Shelledy and Tribune Publishing Company is not questioned.

Finally, in addition to its failure to note the strong finding of relevance and materiality made by the *Garland* court as a precondition to disclosure, the Idaho Supreme Court totally ignored the *Garland* court's finding that, although it was possible that Garland could have learned the identity of the reporter's informant elsewhere, the fact that plaintiff's "reasonable efforts in that direction had met with singular lack of success" made disclosure more appropriate. Thus, in view of the Second Circuit's particularistic balancing of First Amendment freedoms against the need for compelled disclosure, and its recognition that *Garland* did not involve "wholesale disclosure of a newspaper's confidential sources" [259 F.2d at 549], it can hardly be said that the Second Circuit rejected the concept of a qualified privilege. Rather, the court's holding plainly assumes for purposes of its decision that there may be situations wherein a protective order should issue.

In cases subsequent to *Garland*, addressing the question of discovery of a newsman's confidential source in the context of civil litigation, the courts have consistently followed the *Garland* approach in determining whether disclosure should be required. In *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972),

cert. denied, 409 U.S. 1125 (1973), the appellate court affirmed the simultaneous denial of a motion to compel disclosure of a confidential news source and grant of a motion for summary judgment, stating that a minimal precondition to compelled disclosure was "substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports . . ." Id. at 994. The Supreme Court of Idaho, however, ignored the holding in *Cervantes* and merely pointed to the prefatory statement therein that the weight of prior decisional authority did not admit of a privilege to withhold the identity of news sources.

In *Baker* v. *F&F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973), the Second Circuit affirmed the trial court's decision not to order disclosure of a newsman's confidential sources, holding that:

> "though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest [such as would justify infringement of First Amendment rights], we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential source outweighs the public and private interest in compelled testimony." 470 F.2d at 783.

While recognizing that the *Baker* holding upheld the newsman's refusal to testify and expressly found that the identity of the source was not necessary to the plaintiff's case, the court below attempted to distinguish *Baker* on the grounds that, there, applicable state statutes protected journalists from forced dis-

closure. The court below ignored the above-quoted language which recognized a constitutional shield, in addition to any statutory shield.

In *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974), although forced disclosure was upheld, the court expressly found that "*the information sought appears to go to the heart of appellee's libel action, certainly the most important factor in Garland.*" 492 F.2d at 636 (emphasis added). Moreover, despite the fact that the appellant had argued only the existence of an absolute privilege against forced disclosure, the appellate court engaged in an extensive *Garland*-type analysis and balancing of the competing interests before affirming the discovery order. The Supreme Court of Idaho was content to observe that the *Carey* court denied the existence of an absolute privilege (as it had to after *Branzburg*) and upheld forced disclosure, failing to pay heed to the *Carey* court's careful consideration of the surrounding facts, circumstances, and issues involved.

Despite the Idaho Supreme Court's endorsement (and mischaracterization) of compelled disclosure in *Garland* and *Carey,* and its attempt to factually distinguish *Cervantes* and *Baker*, those cases clearly advocate a balancing of the need for disclosure against the public interest in protecting confidential news sources and a close scrutiny of each case on its own facts and circumstances.

As noted by the dissenting opinion below, "the balance is weighted in favor of the first amendment" [Appendix A at 23a.] in those cases by requiring of the party seeking disclosure a showing of a) relevance; b) exhaustion (or a reason why there should not be

exhaustion) of alternative sources; and c) a compelling state interest in disclosure (i.e., a showing that disclosure goes to the heart of the plaintiff's case). See also *Loadholtz* v. *Fields*, 389 F.Supp. 1299 (1975); *Democratic National Committee* v. *McCord,* 356 F.Supp. 1394 (D.D.C. 1973); *Gilbert* v. *Allied Chemical Corporation,* 411 F.Supp. 505 (E.D.Va. 1976); *Buchanan* v. *Cronkite,* Civil No. 1087-73 (D.D.C. 1974); *Brown* v. *Commonwealth,* 204 S.E. 2d 429 (Va. 1974); *State* v. *St. Peter,* 315 A.2d 254 (Vt. 1974); *Morgan* v. *State,* 337 So. 2d 951 (Fla. 1976).

At no point in the majority opinion is exhaustion of alternate sources discussed. See, *Garland* v. *Torre, supra,* at 551; *Baker* v. *F&F Investment, supra* at 784. This requirement of exhaustion of alternate sources, of course, is merely a corollary of the fundamental principal that "even though the governmental purpose [in restricting First Amendment freedoms] be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties where the end can be more narrowly achieved." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960); *see also, Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293, 296 (1961); *Cantwell* v. *Connecticut,* 310 U.S. 306, 307 (1940); *Hynes* v. *Mayor and Council of the Borough of Orodell,* — U.S. —, 48 L.Ed.2d 243 (1976); *Nebraska Press Association* v. *Stuart,* — U.S. —, 49 L.Ed.2d 683, at 700-701, 703, 705 (1976).

Moreover, the Idaho court does not state why disclosure, despite the impairment of First Amendment freedoms occasioned thereby, is necessary in this particular case. The court merely quotes, from the transcript of the trial court's hearing, comments by the

trial judge to the effect that facts obtained from the confidential source, or proof that this source in fact may not exist, " 'goes, if necessary, to the heart or the crux of the plaintiff's case, or may . . . . (Tr.4).' " Appendix A at 4a. Clearly such an equivocal finding of a compelling interest in favor of disclosure of the identity of a confidential source fails to conform to the applicable standards set forth in *Garland* and its progeny. As noted in *Cervantes,* before disclosure of a confidential source is appropriate, there must be at least some other evidence in the record of falsity or actual malice:

> "Thus, if, in the course of pretrial discovery, an allegedly libeled plaintiff *uncovers substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports,* the reasons favoring compulsory disclosure in advance of a ruling on the summary judgment motion should become more compelling . . . . The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous sources can rise to the level of error. *Mere speculation or conjecture about the fruits of such examination simply will not suffice.*" 464 F.2d at 994 (emphasis added).

Your petitioner respectfully submits that the plaintiff Caldero has totally failed to "uncover substantial evidence" showing that the published comments of Petitioner's confidential source are "inherently improbable" or of doubtful veracity. The allegedly libelous comments merely express the opinion of the confidential source relating to whether or not Caldero

was justifiably in grave fear of his life and thereby warranted in shooting the fleeing suspect, Dale Johnson. The factual basis upon which the opinion is based was fully set forth elsewhere in the article. The accuracy of this factual foundation is unchallenged. Moreover, both the opinion of Petitioner's confidential source and the factual basis upon which that opinion is founded are endorsed and corroborated elsewhere in the article by the then Attorney General of Idaho, W. Anthony Park who, as the state's highest law enforcement official, was ultimately responsible for Caldero's actions. The presence of independent corroboration thus distinguishes this case from that in *Carey* v. *Hume, supra,* and dilutes the allegedly "compelling interest" in disclosure. See *Carey* v. *Hume,* 492 F.2d at 637-638; *Cervantes* v. *Time,* 464 F.2d at 994.

The trial court, although it reserved ruling on the defendants' motion for summary judgment, stated that, but for the pendency of the motion to compel, it would have granted summary judgment on the grounds of lack of proof or any showing of actual malice. Apparently, the trial court believed that if, through forced disclosure, it were established that the "police expert" did not exist, then there would have been an issue regarding actual malice. Not only is such an approach contrary to the *Cervantes* holding that mere speculation is insufficient to mandate disclosure, but also, the identity of the source could not be critical in the absence of some basis in fact for the plaintiff's allegations.

Moreover, it is well established that liability for libel can only be founded upon *a false statement of fact,* sufficient in itself to forewarn the news disseminator of its defamatory content. *Gertz* v. *Robert Welch,*

Inc., 418 U.S. 323, 339-340 (1974); *Sellers* v. *Time, Inc.*, 423 F.2d 887, 890 (1970). A mere expression of an opinion—readily perceivable as such—does not constitute a basis for liability. *Gertz* v. *Welch, supra; Old Dominion Branch No. 496* v. *Austin*, 418 U.S. 264 (1974); *Greenbelt Coop. Publ. Ass'n.* v. *Bresler*, 398 U.S. 6 (1970); *Fram* v. *Yellow Cab Co.*, 380 F. Supp. 1314 (1974); *Yorty* v. *Chandler*, 13 Cal. App. 3d 469 (1970); *1 Hanson, Libel and Related Torts*, par. 139 (1969).

Clearly, the identity of the author of a particular opinion cannot be deemed necessary or critical to a Plaintiff's case in a libel action when the underlying factual basis for the opinion is also set forth in the allegedly defamatory news article; when the opinion is corroborated in the same news article by various identified individuals; and when the opinion does not constitute a substantial portion of the article in question. Plaintiff, Caldero, therefore has failed to meet the standard for compelling disclosure of confidential news sources set forth in *Garland* and succeeding cases.

In considering judicial restraints on the exercise of First Amendment rights, this Court has consistently stated that, before the exercise of such rights may be restrained or punished, there must be a clear showing that exercise of those rights poses a "serious and imminent threat to the administration of justice." *Craig* v. *Harney*, 331 U.S. 367, 373 (1947); *see also, New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Schenck* v. *United States*, 249 U.S. 47 (1919) ("clear and present danger" test). Additionally, this Court has held that prior to issuing an order restraining publication, a court must examine alternative measures which might mitigate the potential adverse effects on publication and must find that such measures would not be adequate. *Nebraska Press Association* v. *Stuart*, — U.S. —, 49 L.Ed.2d 683, 700-01 (1976).

In a similar vein, before a court compels disclosure of a newsman's confidential source, it must examine alternative sources for the information sought and find either that such sources have been exhausted or that recourse to such sources would be futile or impossible; additionally, the courts must find that the information sought to be compelled goes to "the heart of the plaintiff's claim." The trial court below failed to make such findings prior to ordering a disclosure of Shelledy's source, and, necessarily, the Supreme Court of Idaho was unable to make such findings. Such findings were an essential prerequisite to any determination that, in the balance, the First Amendment right at issue had to yield to an overriding state interest in the presentation of testimony in civil litigation. In the absence of such findings, it was an abuse of discretion for the trial court to have issued the order of contempt against Petitioner Shelledy.

III. IN CIVIL LIBEL CASES WHEREIN IT IS FOUND THAT ALTERNATIVE SOURCES HAVE BEEN EXHAUSTED AND THERE IS A COMPELLING STATE INTEREST IN DISCLOSURE, THE TRIAL COURT MUST THEN IMPLEMENT THE REMEDY LEAST DESTRUCTIVE OF FIRST AMENDMENT RIGHTS

Your petitioners strongly assert that in those cases where no privilege is found to exist under the *Garland* standard the remedy least destructive of First Amendment rights should then be utilized.[1] See, *Nebraska*

[1] For an extensive discussion and analysis of this issue, *see*, W. Eckhardt, Jr. & A. McKey, *Caldero* v. *Tribune Publishing Co.: Substantive and Remedial Aspects of First Amendment Protection for a Reporter's Confidential Sources*, 14 IDAHO L. REV. 1 (1977).

Press Association v. *Stuart,* — U.S. —, 49 L.Ed.2d 683 (1976); *Coates* v. *Cincinnati,* 402 U.S. 611 (1971); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *United States* v. *Robel,* 389 U.S. 258 (1967); *Zwickler* v. *Koota,* 389 U.S. 241 (1967).

In the instant case, the trial court's failure to consider alternative remedies less destructive of First Amendment rights constituted abuse of discretion. Other remedial measures which were available to the district court upon Shelledy's refusal to comply with its discovery order appear in Rule 37(b)(2) of the Idaho Rules of Civil Procedure (which is identical to the corresponding Federal Rule). There it states that upon the failure of a party to obey an order to provide or permit discovery, "the court . . . may make such orders . . . as are just." Subsections (A) through (D) of this rule list various examples of the kinds of orders contemplated. A trial court, for instance, may enter an order against a disobedient party which establishes certain facts; which precludes raising a particular claim or defense; which prohibits the introduction of certain specified evidence; which strikes all or part of the pleadings; which stays the proceedings; or which dismisses all or part of the proceedings with prejudice. Finally, the rule contemplates punishing or coercing behavior through contempt sanctions.

Cases dealing with remedial orders under Federal Rule 37(b)(2) and its state counterparts show considerable moderation and restraint. *8 Wright & Miller,* § 2284 at 768-72; 4A J. Moore, *Moore's Federal Practice,* ¶ 37, 63 [2.-5] at 3765-69 (1975). The courts have sought to make the "punishment fit the crime" and have "exercised their discretion in a fashion intended

to encourage discovery rather than simply to punish for failure to make discovery." *8 Wright & Miller,* § 2284 at 772.

> "The purpose of discovery rules is to produce evidence for the speedy determination of the trial. The office of 37(d) is to secure compliance with the discovery rules, not to punish erring parties." *Robinson* v. *Transamerica Insurance Co.,* 368 F.2d 37, 39 (10th Cir. 1966).

Contempt orders in particular have been used with restraint:

> "Under most circumstances, orders under subdivisions (b)(2)(A) through (b)(2)(C) have proved satisfactory, and the courts have rarely employed contempt sanctions against parties." 3A Moore, *supra* at ¶ 37.03 [2.-6] at 3775.

This well established practice of leniency in meting out sanctions under 37(b)(2) should be mandatory where a harsher remedy such as a contempt order will diminish fundamental constitutional rights under the First Amendment.

The concept that Rule 37 imposes an obligation to consider all alternative sanctions has been recognized in an analogous context:

> "Rule 37 imposes on a court an obligation to exercise reasoned discretion as to alternative sanctions." *In re Professional Hockey Antitrust Litigation,* 531 F.2d 1188, 1192 (3rd Cir. 1976).

In the case cited above, the U. S. Court of Appeals for the Third Circuit reversed the dismissal of an anti-trust action on the ground that the record contained no showing that alternative sanctions had been

considered prior to imposition of the severe remedy of dismissal. The court noted:

> "The imposition of any sanction, although within the trial court's discretion . . . must be considered in light of the Fifth Amendment's due process clause. *Society International* v. *Rogers,* 357 U.S. 197, 209 (1958)." *Id.*

The First Amendment right jeopardized by disclosure of a confidential source is of equal stature with the due process rights of the Fifth Amendment and should be afforded the same procedural safeguards. Petitioners assert that where First Amendment rights may be diminished, as in the case where a contempt order is imposed for non-disclosure, the court has an obligation to consider all alternative sanctions and select the one least destructive of First Amendment freedoms.

Petitioners respectfully submit that both the Second Judicial District Court and the Supreme Court of Idaho have unnecessarily and inappropriately permitted this cause of action to develop into its present posture—a posture which creates a needless confrontation between plaintiff's legitimate right to discovery and the public's legitimate First Amendment interest in non-disclosure of the identity of a newsman's confidential news source. Had the trial court elected to exercise its discretion to employ any of the less drastic remedies available under Rule 37(b)(2)—as, for instance, an order either conditionally or conclusively establishing the fact that the source referred to by Shelledy in the article did not exist—Caldero, although benefitting at trial from such an order, would still have been put to the proof of his claim without overriding

Shelledy's right to, and the public interest in non-disclosure of, the identity of a confidential news source. In addition, Petitioners would not be denied their day in court on other issues in the case to which the existence of an informant would have no relevance.

The federal courts have explicitly recognized the use of a conditional finding of fact in lieu of more severe remedies. In *Reynolds* v. *U.S.,* 192 F.2d 987 (3rd Cir. 1951), *rev'd, on other grounds,* 345 U.S. 1 (1953), the Third Circuit affirmed a district court decision which approved the application of Rule 37(b)(2)(1) establishing certain facts in the absence of a valid claim of privilege under Rule 34 of the Federal Rules of Civil Procedure.

Reynolds involved a wrongful death action brought against the United States Government as a result of the crash of a military aircraft. Plaintiffs moved for discovery of the official report of the accident under Rule 34. The Government filed a formal claim of privilege in response, stating that the report contained military secrets.

The District Court then ordered that the facts on the issue of negligence would be taken as established and the Third Circuit affirmed after final judgment had been entered for the plaintiff. This Court reversed on the ground that the Government had rightfully asserted a valid claim of privilege, but did so without criticism of the appropriateness of the remedy.[2]

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[2] "The judgment in this case imposed liability upon the Government by operation of Rule 37, for refusal to produce documents under Rule 34. Since Rule 34 compels production only of matters 'not privileged' the essential question is whether there was a valid claim of privilege under the Rule. We hold

It is submitted that the remedy least destructive of First Amendment rights on the facts of *Caldero* would have been the remedy employed by the district court in *Reynolds*— an order under Rule 37(b)(2)(A) establishing either conditionally or conclusively the fact that the source referred to in the article by Shelledy did not exist. The only effect of such an order—assuming that summary judgment was not still appropriate on the issue of actual malice under the rule of *New York Times* v. *Sullivan*—would have been to cause a denial of summary judgment, sending the case to trial. At trial, the trier of fact would have then been free to consider whether the absence of a source, coupled with other evidence, met the standard of actual malice. Actual malice was the appropriate standard since the trial judge had already determined that Caldero was a public official.

Application of this remedy would allow the press to retain control over the decision whether to disclose without being faced with the highly coercive prospect of imprisonment for contempt.

This Court has explicitly recognized that where First Amendment rights may be endangered, any conflicting legislative or judicial interests must be imple-

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that there was. . . ." *United States* v. *Reynolds*, 345 U.S. 1, 6 (1953).

Thus, this decision implies that in the absence of a valid claim of privileges, Rule 37(b)(2)(1) may operate to establish facts in the plaintiff's favor.

It is also significant that the Court noted that the necessity for producing the documents was greatly minimized by the offer of the government to produce the surviving crew members and permit them to testify, in effect, recognizing that the plaintiff should exhaust alternative sources before disclosure would be required.

mented by the least restrictive means available. In *Nebraska Press Association* v. Stuart, — U.S. —, 49 L.Ed.2d 683 (1976), this Court dealt with the question of whether a prior restraint in the form of a gag order designed to protect a criminal defendant's Sixth Amendment rights to a fair trial violated the First Amendment. In determining that the gravity of the "evil" discounted by its improbability did not justify the invasion of the right of a free press, this Court examined three factors: "(a) the nature and extent of pre-trial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; (c) how effectively a restraining order would operate to prevent the threatened danger." — U.S. at —, 49, L.Ed.2d at 683.

The gag order was found to violate the First Amendment for several reasons including the trial court's failure to make explicit findings that other remedial alternatives less damaging to First Amendment values would have been ineffective. — U.S. at —, 94 L.Ed.2d at 701. *See also, Sheppard* v. *Maxwell*, 384 U.S. 333 at 357-362 (1966).

Petitioners assert that no reporter should be imprisoned for contempt based on the refusal to disclose a source in a civil case without similar findings that less restrictive measures such as those alternatives enumerated in Rule 37(b)(2) of the Idaho Rules of Civil Procedure would prove unavailing.

This Court has held elsewhere that where First Amendment rights may be abridged, the least restrictive measures must always be implemented though the restraint imposed was indirect and did not involve a prior restraint. In *United States* v. *Robel*, 389 U.S.

258 (1967), Chief Justice Warren, writing for the majority, stated:

> "Our decision today simply recognizes that, when legitimate concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goals by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." 389 U.S. at 268.

See also, *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

Both *Robel* and *Shelton,* (unlike *Nebraska Press*), involved *indirect* restraints on protected First Amendment rights (freedom of association) rather than a prior restraint. The negative effect on newsgathering caused by disclosure herein is a similar indirect restraint. Moreover, in neither *Robel* nor *Shelton* was empirical proof of the impairment of First Amendment rights required. *See, Branzburg* v. *Hayes,* 408 U.S. at 733 (Stewart, J., Dissenting.)

Moreover, the remedy of imprisonment for contempt is far less likely to be effective than the proposed remedy under Rule 37(b)(2)(A). Where First Amendment rights are jeopardized, remedies of doubtful efficacy should not be employed. This principle was explicitly recognized in *Nebraska Press Association* v. *Stewart:*

> "We must assess the probable efficacy of prior restraint on publication as a workable method of protecting Simants' right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders." 49 L.Ed.2d at 701.

Substantial empirical evidence indicates that the remedy of imprisonment for contempt is unlikely to be

effective. Between March, 1973 and October, 1976, twenty-one reporters were cited for contempt in this country. Only seven ultimately disclosed their sources. Twelve reporters were jailed and later released when it became apparent that they would not disclose their sources.[3]

Two cases in particular have focused national attention on confrontations between the courts and the press. In *Rosato* v. *Superior Court of Fresno County,* 51 Cal. App. 3d, 190, 124 Cal. Reptr. 427 (1975), *cert. denied,* — U.S. —, 96 S.Ct 3200 (1976), four reporters from the *Fresno Bee* were sentenced to indefinite coercive jail terms The California Supreme Court upheld the sentences. The men were eventually released because the sentencing judge decided "they had acted in good faith and continued imprisonment would not cause them to reveal their sources." A similar fact pattern occurred in the *Farr* cases. *Farr* v. *Superior Court,* 22 Cal. App. 3d 59, 99 Cal. Rptr. 342 (2d Dist. 1971); *In re Farr,* 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (2d Dist. 1974); *Farr* v. *Pitchess,* 522 F.2d 464 (9th Cir. 1975), *cert. denied,* — U.S. —, 49 L.Ed.2d 1203 (1976). Farr also received a coercive contempt citation for refusing to reveal the source of information concerning the Manson murder trial. Farr was ultimately released from imprisonment because the sentencing court thought that further punishment would not produce testimony.

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[3] See, PRESS CENSORSHIP NEWSLETTER, March, 1973—October, 1976. A survey of this source over the time period indicated also reveals that an aggregate of 133 subpoenas were issued in civil and criminal cases. Of these, thirty-five were issued in federal court while ninety-eight were issued in state courts.

Recent cases clearly suggest that imprisonment for contempt is more likely to lead to martyrdom than disclosure. Reporters have demonstrated considerable fortitude in this regard. As a consequence, coercive contempt citations have resulted in damaging confrontations between the press and the courts—confrontations which can be easily avoided in cases such as the instant case. The conclusion that contempt has not been and is not likely to be an effective remedy is inescapable.

Notwithstanding its ineffectiveness, contempt can be exceedingly costly—both economically and in terms of detrimental effects on the media and judicial institutions. Contempt citations have resulted in extensive delays in the discovery process inflicting high costs on all parties and consuming judicial time.

Perhaps more importantly, confrontations between the press and the judiciary present the public with a spectacle of a standoff between an apparently ineffective court system and a defiant press. Neither image is likely to inspire great public confidence and respect. The media and the judiciary are both institutions which are fundamental to our democratic system. Our Constitution and the First Amendment make this clear. We, therefore, suffer considerable social damage as a consequence of our collective inability to provide principled and orderly solutions to these standoffs. As a matter of policy, such confrontations should be avoided whenever any viable alternative exists. Moreover, the First Amendment mandates that the "least destructive" means be employed. In some cases, contempt may be unavoidable. In cases like *Caldero,* there are effective alternatives.

In light of the clear advantage of the suggested Rule 37(b)(2)(A) remedy and the strong First Amendment interest present in *Caldero* and in view of the basic command of Rule 37(b)(2) to "make such orders . . . as are just", we respectfully submit that the trial court abused its discretion in selecting the contempt remedy without considering the available alternatives. Petitioners submit that the First Amendment requires a trial court to consider all remedial alternatives under Rule 37(b)(2) and adopt the one least destructive of First Amendment freedoms.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a writ of certiorari be granted to review the judgment of the Supreme Court of the State of Idaho.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

MICHAEL A. CALDERO, *Plaintiff-Respondent*

v.

TRIBUNE PUBLISHING COMPANY and JAMES E. SHELLEDY, *Defendant-Appellants.*

IN RE SHELLEDY

SHEPARD, J.

This is an appeal from an order, judgment, and sentence of and for contempt resulting from a newsman's refusal to disclose the identity of an informant. The existence and/or extent of a constitutionally based privilege from such disclosure is one of first impression in this jurisdiction.

Michael Caldero instituted an action in libel against the Tribune Publishing Company based on an article printed in the November 23, 1973, issue of the Lewiston Morning Tribune. The substance of the complaint was that the article contained "an unfair, false and malicious account" of an incident involving respondent while he was employed as an undercover agent for the Idaho Bureau of Narcotic Enforcement.

The article purported to describe in detail an incident of August 27, 1972, when Caldero and another agent were in a public park in Coeur d'Alene, Idaho, and in the process of an arrest of one Booth who had attempted to sell them narcotics. Booth was in the company of one Johnson and when an altercation ensued between Booth and the two agents, Johnson attempted to exit the scene in a vehicle. Although the precise facts are unclear and in dispute, it is at least agreed that Caldero fired three

shots through the windshield of the Johnson-driven vehicle, two of which struck and injured Johnson.

The Tribune article in question appeared more than a year after the event under the by-line of Jay Shelledy and had as its focus the professional propriety of Caldero's conduct. Caldero claimed that "he fired in self-defense; that Johnson tried to run him down." In the article Caldero's assertion was contrasted with statements from an eyewitness and general observations from the county prosecutor and the State Attorney General. The following statements of principal interest here were attributed to an undisclosed "police expert", i.e.:

> "One police expert, in an off-the-record interview with the Tribune, said Caldero's justification for shooting didn't add up. His reasoning was derived mainly from logistical facts:
>
> "—It was more than 90 minutes after sundown so the lighting was too poor to see Caldero's wallet badge at a distance greater than a few yards.
>
> "—The distance between Caldero and Johnson's car when Johnson pulled out of the parking stall was not sufficient for the vehicle to have picked up much speed, especially since the tires were not getting traction in the loose gravel. Even the slowest agent could have stepped out of the way, unless he was determined to throw himself in front of the car to physically stop it. (Witnesses estimate the speed of the car at less than 10 m.p.h. when the shots were fired.)
>
> "Caldero didn't have time to pull out his gun while running toward the car, dig out his wallet and show his badge, get out of the way of the car, replace his wallet and fire three shots with both hands on the gun as police are taught to fire.
>
> "The position of the bullet holes and angle at which Johnson was hit put Caldero adjacent to the left

> front tire when he fired. Therefore, the car had missed him and he was in no apparent danger and in good position to shoot the tires out if he felt he had to fire his gun.
>
> "But Booth's sale and Johnson's accomplice's role were not 'shooting' offenses. Caldero's only justification would be to maintain his life was in grave danger. Otherwise, it would be a case of a young policeman who panicked, or who became carried away."

Following the institution of the Caldero action, the Tribune filed an answer thereto and counsel for both parties proceeded to take depositions in the course of discovery. In that process Shelledy was deposed and questions were asked by counsel pertaining to the portion of the article on the opinion of the "police expert." Shelledy directly refused to answer questions which would in his opinion either reveal or lead to the identity of the source of the information. Shelledy thereafter was added as a party to the action together with an amended claim of invasion of privacy.

Shelledy was the subject of a motion to compel answers and the defendants filed a motion for summary judgment. Both motions were subject to a hearing at the conclusion of which the court ordered disclosure by Shelledy and reserved ruling on the summary judgment motion. The court entered an order which directed Shelledy to appear and answer three questions:

> "1. Who is the person identified as the 'police expert' in the subject article?
>
> "2. What was the time and place of the conversation between the deponent and the police expert?
>
> "3. What did the police expert say, and what information did the police expert relate to the deponent, during the conversation or any other?"

The court, in reserving ruling on defendants' summary judgment motion, indulged in the following colloquy:

> "MR. CLEMENTS (Defendants' attorney): • • • [A]ssuming that you would satisfy yourself, that the source existed, that the source gave the information to Mr. Shelledy, by way of his opinion as reported • • • would you feel that in this case there would be actual malice?
>
> "THE COURT: My feeling would be at that point—and prior to today at least—that under those facts, I would grant summary judgment. However, I must say because Mr. Shoemaker (plaintiff's counsel) was so strong and positive on his reading of KTVB, I would want, before I make such a ruling, I'd go back and look at that again • • •."

Apparently, plaintiffs counsel had argued to the district court that Taylor v. KTVB, 96 Idaho 202, 525 P.2d 984 (1974), holds that "malice" may be inferred from a publication which fails to distinguish mere opinion from fact. Parenthetically, we note that we do not read that case as so holding. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). The district court opined:

> "I believe • • • every opportunity to get his case into court must be given to the plaintiff; and as a consequence of that, I believe that the matter of the identity of the police expert is material; it's relevant. It goes, if necessary, to the heart or the crux of the plaintiff's case, or may. On the other hand, that information, when explored, may disclose insufficient information to support the plaintiff's case as against a Motion for Summary Judgment that • • • could be ruled upon if I reserve judgment on your Motion for Summary Judgment." (Tr. 4.)

Shelledy was again deposed and with respect to questions two and three of the court order, he indicated that

the conversation took place by telephone approximately ten days prior to publication of the article. He explained to his anonymous source the circumstances surrounding the shooting incident as they had been revealed by his investigation and the anonymous source opined that under those circumstances in retrospect, Caldero's life was not in danger at the time of the shooting. Collateral questions which had been put to the appellant were rejected by the district court as being beyond the scope of his order.

Upon being asked the identity of the police expert, Shelledy read a statement declaring his refusal to answer was based upon the First Amendment of the United States Constitution and his professional code of ethics. Whereupon after being advised of the consequence of his conduct, he was judged in contempt and ordered incarcerated for a period of 30 days. It was ordered that thereafter he would be re-examined as to the identity and source of his information. Upon order, the execution of that judgment has been stayed pending this appeal.

We note at the beginning of our analysis:

> "In 1958, a news gatherer asserted for the first time that the First Amendment exempted confidential information from public disclosure pursuant to a subpoena issued in a civil suit, • • •." Branzburg v. Hayes, 408 U.S. 665 at 685.

In a general context Idaho's statutory scheme contemplates:

> "All persons, *without exception,* otherwise than is specified at the next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perception to others, may be witnesses." I.C. § 9-201.
>
> "A witness, served with a subpoena, must attend at the time appointed, with any papers under his control,

> required by the subpoena, and *answer all pertinent and legal questions,* and, unless sooner discharged, must remain until the testimony is closed." I.C. § 9-1301.

I.C. § 9-202 proscribes testimony from persons who are of unsound mind, under ten years of age and certain persons seeking to testify as to communications occurring before the death of a deceased person.

I.C. § 9-203 provides:

> "There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases: • • •."

Thereafter are proscribed certain communications between husband and wife, attorney and client, clergyman or priest and confessor, physician-patient, communications to a public officer under certain circumstnaces, counselor-student, certain communications between parent and child. We note that such statutory scheme has been considered and amended by our legislature as recently as 1972.

It is clear that appellant here falls within the clear requirement that he appear and testify and that his asserted privilege is not recognized nor is he excused from testifying under our statutes. It is not necessary and we do not examine any question as to conflict between any future rule of this Court and a statutory privilege. *See,* R. E. W. Construction Co. v. District Court of Third Judicial Dist., 88 Idaho 426, 400 P.2d 390 (1965).

The general theory of the law and of the commentators has been that new testimonial privileges are disfavored since they obstruct the search for the truth. Wigmore has condemned the privileges as being derogations from the positive general rule that everyone is obliged to testify when properly summoned, and that privileges are obstacles

to the administration of justice. 8 Wigmore, On Evidence, § 2192 (McNaughton's revision 1961). *See also,* McCormick, Evidence, 159 (2d ed. 1972). As stated in the preface to the American Law Institute's Model Code of Evidence, page 7: "Such a privilege suppresses valuable evidence to which the trier of the fact is competent to give its proper weight." To paraphrase Learned Hand in McMann v. Securities and Exchange Admin., 87 F.2d 377 (C.A. 2d Cir. 1937), we are not faced with one who is a client, a penitent, a patient or a spouse and since testimonial privileges are based upon specified confidential relationships, nobody by contract, express or implied, can abridge public duties.

A number of states provide newsmen a statutory privilege of varying nature,[1] but none has been provided in Idaho. Although often introduced, no such privilege has been provided by a federal statute.

We come then to appellant's major contention that he cannot be compelled to disclose the information sought here because of the freedom of the press guaranteed by the First Amendment to the Federal Constitution. It is argued that the disclosure of information acquired by a

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[1] Of interest is the Indiana statute which was amended in 1973 to eliminate the previous requirement that to qualify for the privilege a journalist must be employed by a newspaper having a certain circulation and a five-year longevity. Ind.Stat. Ann. § 34-3-5-1 (Supp. 1973). *See also,* Ala. Code tit. 7, §370 (1960); Alaska Comp. Laws Ann. §§ 09.25.150-.220 (1973); Ariz. Rev. Stat. Ann. § 12-2237 (Supp. 1976); Ark. Stat. Ann. § 43-917 (1964); Cal. Evid. Code § 1070 (West Supp. 1976); Ill. Ann. Stat. ch. 51, § 111 (Supp. 1972); Ky. Rev. Stat. § 421.100 (1972); La. Rev. Stat. tit. 44, §§ 1451-1454 (Supp. 1972); Md. Ann. Code art 35, § 2 (1965); Mich. Comp. Laws Ann. § 767.5a (1968); Mont. Rev. Codes Ann. tit. 93, §§ 601-1-602-2 (1964); Nev. Rev. Stat. tit. 4, § 49-275 (1975); N.J.Stat. Ann. § 2A:84A-21 (1976); N.M. Stat. Ann. § 20-1-12.1 (Supp. 1975); N.Y. Civil Rights Law § 79-h (McKinney 1976); Ohio Rev. Code Ann. §§ 2739.04, 2739.12 (1971); Pa. Stat. Ann. tit. 28, § 330 (Supp. 1976).

newsman from a confidential source would have a "chilling effect" on the ability of newsmen to utilize confidential sources and thus inhibit the media's ability to gather news and inform the public, all in violation of the First Amendment guaranty.

In 1958 the entertainer Judy Garland brought an action against Columbia Broadcasting System. Garland v. Torre, 259 F.2d 545 (1958), cert. den. 358 U.S. 910, 79 S.Ct. 237. There, as here, plaintiff alleged false and defamatory statements published in newspapers. There, as here, during pretrial discovery proceedings Torre refused to divulge the name of a "network executive" to which the publication had referred as the source of certain statements. The witness refused to divulge, was held in contempt and the appeal followed. The opinion of that court was delivered by Potter Stewart, then sitting as a circuit judge. The argument was made therein, first that a newsman has an absolute privilege against disclosure of confidential sources which is protected by the First Amendment to the Constitution, and secondly, that at least in certain circumstances a confidential news source is protected by a qualified privilege. We read the opinion of Mr. Justice Stewart as rejecting both alternatives. As he stated:

> "Freedom of the press, hard won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.
>
> "It would be a needless exercise in pedantry to review here the historic development of that duty. Suffice it to state that at the foundation of the Republic the obligation of a witness to testify and the correlative right of a litigant to enlist judicial compulsion of testimony were recognized as incidents of judicial power of the United States. [citations omitted] Whether or not the power to invoke this judicial power be considered an element of Fifth Amendment due process its essentiality to the fabric of our society is beyond controversy. As Chief Justice Hughes put it: 'One of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned.'

> • • •
>
> "If an additional First Amendment liberty—the freedom of the press—is here involved, we do not hesitate to conclude that it too must give place under the constitution to a paramount public interest in the fair administration of justice. 'The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all others, and lies at the foundation of orderly government.' "

Although certiorari was denied, 358 U.S. 910, and we are not to speculate thereon, nevertheless, we deem it significant that Garland v. Torre was cited in the opinion of Mr. Justice White in Branzburg v. Hayes, 408 U.S. 665, 92 S.Ct. 2646 (1972), but is strangely missing in the dissent authored by Mr. Justice Stewart.

Except as noted above we find ourselves without guidance in the United States Supreme Court decisions in cases involving a newsman's refusal to divulge confidential informants in the course of civil litigation. Both parties hereto rely upon and cite heavily from Branzburg v. Hayes, *supra*. That decision involved a trilogy of cases (Pappas, Caldwell and Branzburg), all of which were cast in the context of the refusal of newsmen to divulge sources of confidential information and/or information received under a confidential agreement when subpoenaed to appear before a grand jury.

There, as here, it was argued that the First Amendment insulated completely or to a limited degree a newsman divulging confidential sources or confidential information. In the lower courts the assertion of the petitioners, Branzburg and Pappas, were rejected and that rejection of the privilege was upheld on appeal. In the third case, *Caldwell,* the Ninth Circuit had upheld the petitioner's claim of privilege holding that absent some special showing of necessity he was insulated from disclosure on the basis of the First Amendment. In Caldwell, that decision of the Ninth Circuit Court of Appeals was reversed.

While as noted above, *Branzburg* was cast in the criminal area and testimony before a grand jury, nevertheless, we deem certain language therein to be of guidance. It was stated by Mr. Justice White:

> "Until now the only testimonial privilege for unofficial witnesses that is rooted in the federal constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.
>
> • • •
>
> "We are admonished that refusal to provide a First Amendment reporter's privilege will undermine the freedom of the press to collect and disseminate news. But this is not the lesson history teaches us. As noted previously, the common law recognized no such privilege, and the constitutional argument was not even asserted until 1958. From the beginnings of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press. • • • If newsmen's confidential sources are as sensitive as they are claimed to be, the prospect of being unmasked whenever a judge determines the situation justifies it, is hardly a satisfactory solution to the problem. For them, it would appear that only an absolute privilege would suffice.
>
> "We are unwilling to embark the judiciary on a long and difficult journey to such an uncertain destination. The administration of a constitutional newsman's privilege would present practical and conceptual difficulties of a high order. Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege, a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods." 408 U.S. at 689-690, 698-699, 702-704.

Four of the Justices, Stewart, Brennan, Marshall and Douglas dissented. Mr. Justice Powell filed a special concurring opinion and it is argued that such detracts from the conclusiveness of the plurality opinion. We do not agree. Mr. Justice Powell concurred in the opinion of the Court written by Mr. Justice White and while the Powell special concurring opinion is brief and somewhat enigmatic, we read it only to state that if an "investigation is not being conducted in good faith [the newsman] is not without remedy."

Although in different contexts, the United States Supreme Court has prior to *Branzburg* used strong and compelling language regarding asserted derogations of the testimonial privilege. In United States v. Bryan, 339 U.S. 323 (1950), the Court stated:

> "On the other hand, persons summoned as witnesses by competent authority have certain minimum duties

and obligations which are necessary concessions to the public interest in the orderly operation of legislative and judicial machinery. A subpoena has never been treated as an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase. If that were the case, then, indeed, the great power of testimonial compulsion, so necessary to the effective functioning of courts and legislatures, would be a nullity. We have often iterated the importance of this public duty, which every person within the jurisdiction of the government is bound to perform when properly summoned."

In Blackmer v. United States, 284 U.S. 421 (1932), the Court stated:

"It is also beyond controversy that one of the duties the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned."

As recently as 1974 the Court handed down its historic decision in United States v. Nixon, 418 U.S. 683, in which the Court affirmed the "ancient proposition of law" stated in *Blackmer, Brian* and *Branzburg* "that the public has a right to every man's evidence, except for those persons protected by a constitutional, common law, or statutory privilege, * * * " The Court also stated:

"The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. * * * The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To insure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence

needed either by the prosecution or by the defense. * * * Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth."

Also in 1974 in Pell v. Procunier, 417 U.S. 817 (1974), the Court said:

"The Court there [Branzburg] could 'perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings [was] insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.' " 417 U.S. at 833.

Therefore our reading of Branzburg v. Hayes, *supra,* is to the effect that no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version. The only restrictions against compelled disclosure appear to be in those cases where it is demonstrably intended to unnecessarily harrass members of the news media on a broad scale by means of having an unnecessary impact on protected rights of speech, press or association.

The appellant commends to our attention the decisions of United States Courts of Appeals, Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972) cert. denied, 411 U.S. 966; and Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972) cert. denied, 409 U.S. 1125. We conclude that each may be distinguished from the present case in several respects. *Baker* involved an appeal from a trial court's interlocutory refusal to compel a journalist to disclose the identity of a source. On appeal the Court noted

that the journalist was not a party to the underlying action and that there was no showing that the identity of the source was necessary to plaintiff's case. The Court there emphasized that a ruling on a discovery motion is discretionary and therefore would only be reviewed on a showing of abuse of discretion. Lastly and perhaps most importantly, although that action was in federal court, the laws of two states were relevant. The action was pending in the federal court for Illinois and the discovery motion was heard in the federal court for New York. Both Illinois and New York had enacted legislation protecting journalists from forced disclosure of their sources. N.Y. Civil Rights Law § 79-H (McKinney's 1976); Ch. 51 Ill. Rev. Stat. § 111 et seq. (1971).

Cervantes was a diversity case in the federal court brought for libel against a national magazine. The reporter who wrote the allegedly libelous material was deposed at pre-trial but refused to reveal the identity of condential informants within the United States Department of Justice. Prior to the time of reaching the merits of the discovery motion, the trial court granted a motion for summary judgment. The Court on appeal concluded that the refusal to require disclosure was not reversible error and affirmed the lower court's summary judgment rendered against plaintiff. In passing, the Court in *Cervantes* acknowledged that "the weight of decisional authority holds that newsmen do not have a First Amendment privilege to withhold news sources." 464 F.2d at 992. As was stated in Dow Jones & Co., Inc. v. Superior Court, 303 N.E.2d 847 (Mass. 1973):

> "We refuse to extrapolate from the Cervantes decision a requirement that, because in libel actions under federal procedures it is possible to obtain a judgment on the merits before the discovery issue is ruled on, therefore in libel actions in our courts discovery of a newsman's sources cannot be ordered without a preliminary evaluation of the probable results on the merits." at 851.

We move then to consideration of our own Constitution, Art. I, § 9, guaranteeing the freedom of speech and press. We do so in view of the language of *Branzburg* stating:

> "It goes without saying, of course, that we are powerless to bar state courts from responding in their own way and construing their own constitutions so as to recognize a newsman's privilege either qualified or absolute."

Art. I, § 9, of our Constitution provides:

> "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty."

That provision of our Constitution has seldom been considered by this Court since McDougall v. Sheridan 23 Idaho 191, 128 P. 954 (1913), which although of historical interest, is not relevant to the case at bar. None of our recent decisions in the area of freedom of press have construed our state constitutional provisions.

As herein stated, a statutory privilege against disclosure has been enacted in some jurisdictions. Those courts of our sister states who, at least at the time of their decision, did not have such a statutory privilege are somewhat divided as to judicial creation of the privilege. However, the majority have refused to create a court mandated privilege.

In State v. Buchanan, 436 P.2d 729 (Ore. 1968), the court commented on an asserted privilege against a newsman's disclosure of confidential sources:

> In the decisions dealing with reporter's asserted right to refuse to disclose his source of information, the courts have held that rights of privacy, freedom of

association, and ethical convictions are subordinate to the duty of every citizen to testify in court.

"Indeed it would be difficult to rationalize a rule that would create special constitutional rights for those possessing credentials as news gatherers which would not conflict with the equal privileges and equal protection concepts also found in the constitution. Freedom of the press is a right which belongs to the public; it is not the private preserve of those who possess the implements of publishing • • •.

"Apart from the definitional difficulties in attempting to give constitutional status to a privilege or qualified news gathers which presumably would be denied to less favored classes, there is another objection to discrimination between news gatherers and other persons. Such a practice would be potentially destructive of the very freedom that is sought to be preserved by this appeal. After the lessons of colonial times, the First Amendment required the federal government to resist the normal temptation of rulers to regulate, license or otherwise pass upon the credentials of those claiming to be authors and publishers. An invitation to the government to grant a special privilege to special class of 'news gatherers' necessarily draws after it an invitation to the government to define the membership by class. We doubt that all news writers would want the government to pass on the qualifications of those seeking to enter their field. • • •.

"Assuming that legislators are free to experiment with such definitions, it would be dangerous business for courts, asserting constitutional grounds, to extend to an employee of a 'respectable' newspaper a privilege which would be denied to an employee of a disreputable newspaper; or to an episotic pamphleteer; or to a freelance writer seeking a story to sell on the open market; or, indeed, to a shaggy nonconformist

who wishes only to write out his message and nail it to a tree. If the claimed privilege is to be found in the constitution, its benefits cannot be limited to those whose credentials, may, from time to time, satisfy the government." At 731-732.

In 1961 in the matter of In re Goodfader's appeal, 367 P.2d 472, the Hawaii Supreme Court stated:

"In this jurisdiction no statutory privilege against disclosure is extended to newsmen. Consistently with the foregoing general rule, therefore, no such privilege should be judicially recognized. However, it is stated that this is a vitally important case to the new state of Hawaii and as the issue presented is a matter of first impression, we are urged to pioneer in the field and take advantage of the 'opportunity to establish unequivocally that a right of a free press guaranteed by the constitution of our state shall be given as broad a scope as is necessary to insure a truly free press.' Also, it is said: 'To accomplish this objective confidential sources of information must be held to be immune from compulsory disclosure and appellant's silence a constitutionally protected right.' Although urged primarily from a constitutional standpoint, alternately it is arguel that the same result is necessary from a modernistic public policy standpoint. What, in effect, is actually asked of us is to create an evidentiary privilege in favor of newsmen. We are not favorably disposed to the invitation."

In re Pappas, 266 N.E.2d 297 (Mass. 1971), was one of the three cases reviewed by the U.S. Supreme Court in *Branzburg*. In *Branzburg* the *Pappas* decision was affirmed and characterized as stating the general law. In the *Pappas* opinion is substantial discussion relative to the asserted privilege of newsmen from disclosure of confidential sources and the cases and commentators of significance to the question.

In 1973 the Massachusetts court in Dow Jones & Co., Inc. v. Superior Court, 303 N.E.2d 847, had for consideration the application of its holding in *Pappas* to a civil suit for libel the facts of which are substantially similar to those of the case at bar. Discussed and distinguished were Baker v. F & F Investment, *supra,* and Cervantes v. Time, Inc., *supra.* The court discussed its previous *Pappas* decision and the acceptance of its rationale by the United States Supreme Court in *Branzburg,* and then held that *Pappas* represented the correct view and should be extended to civil cases in the libel field.

While admittedly United States v. Liddy, 354 F.Supp. 208 (1972), was in the context of a criminal prosecution at trial, Judge Sirica observed therein:

> "There can be little dispute that the common law recognized no privilege which would support a newspaper or reporter in refusing, upon proper demand, to disclose information received in confidence. Such a privilege, if it exists, must grow out of the first amendment free press guarantee. Quite appropriately, in this court's view, the Supreme Court has recognized as component parts of that guarantee the freedom to publish without prior governmental approval, a right of circulation, freedom to distribute literature and the right to receive printed matter. And most recently with the Supreme Court's decision of Branzburg it may be said that a right to gather news has been explicitly acknowledged. While acknowledging this corollary right, however, the court rejected the claim that such a right implies a privilege to protect the identity of news sources. After citing numerous cases in which restrictions on the right to gather news have been sustained the court classified the requirement to answer subpoenas and disclose sources as another instance of permissible restriction. The majority noted that 'the evidence fails to demonstrate that there would be significant construction of the flow of news to the public if this court reaffirms the prior common law and constitutional rule regarding the testimonial obligation of newsmen.' "

In Carey v. Hume, 492 F.2d 631 (1974 D.C. Cir.) that court was faced with a factual pattern substantially similar to the case at bar. The action was one in libel and the newspaper story reflected that part of the information supplied therein was from an undisclosed source. In the course of the pre-trial discovery upon being asked for disclosure of those sources the information was denied on the basis of an asserted privilege founded in the First Amendment. The court reviewed *Branzburg, supra;* Garland v. Torre, *supra;* Dow Jones & Co. v. Superior Court, *supra.* The court stated:

> "Even if he [plaintiff] did prove that the statements were false, Sullivan also requires a showing of malice or reckless disregard of truth. That further step might be achieved by proof that appellant [newsman] in fact had no reliable sources, that he misrepresented the reports of his sources, or the reliance upon those particular sources was reckless.
>
> "Knowledge of the identity of the alleged sources would logically be an initial element in the proof of any such circumstances. Although it might be possible to submit the question of malice to the jury simply on the basis of conflicting allegations of the parties, that procedure would seem to provide the plaintiff little prospect of success in view of his heavy burden of proof. Consequently, we find that the identity of appellant's sources is critical to appellee's claim.
>
> • • •
>
> "What we have decided—and all that we have decided—is that the district court cannot, on the limited

> record before us, be said to have abused the discretion invested in it to grant or to deny a motion to compel discovery under Rule 37. We have rejected the only contention made to us by appellant, and that was the pre-Branzburg claim that there either is, or should be, an absolute First Amendment barrier to the compelled disclosure by a newsman of his confidential sources under any circumstances. That was not, in our view, the law before Branzburg, and it is certainly not the law after, in either civil or criminal proceedings."

There are to be sure cases wherein courts have differed from those cited above. *See,* State v. Knops, 183 N.W.2d 93 (Wis. 1971); Loadholtz v. Fields, 389 F.Supp. 1299 (1975 U.S. Dist. Court M.D. Fla.); Brown v. Commonwealth, 204 S.E.2d 429 (Va. 1974); State v. St. Peter, 315 A.2d 254 (Vt. 1974); Morgan v. State, 337 So.2d 951 (Fla. 1976). However, at best those decisions discuss the privilege as being qualified.

Of somewhat marginal interest in the case at bar are those cases arising in jurisdictions wherein exist legislatively created statutory privilege. *See,* Re Bridge, [sic] 295 A.2d 33 (N.J. 1972). There the court followed *Branzburg* in refusing to create a First Amendment privilege and although the New Jersey evidence rule extends privilege to newspapermen to refuse to disclose the source of any information published in the newspaper, such only protects the source and not the information itself, cert. denied, 36 L.Ed.2d 189. *See also,* Lightman v. State, 294 A.2d 149, aff'd, 295 A.2d 212, cert. denied 36 L.Ed.2d 414; People v. Dan, 342 N.Y. Supp.2d 731, appeal dismissed, 344 N.Y.2d 955; People v. Wolf, 333 N.Y.Supp.2d 299. *See also,* Hestman v. State, 273 N.E.2d 282 (Ind. 1971).

One of the more recent developments in an adjunct area is the case of Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975). For earlier state court history see Farr v. Superior Court, 99 Cal.Rptr., 342 cert. denied, 409 U.S. 101, and Re Farr, 111 Cal.Rptr. 649. In *Pitchess,* the Court stated:

> 'This appeal presents the no-longer novel question regarding the extent of protection afforded by the First Amendment 'free press' provisions to any newspaper reporter who resists judicially ordered disclosure of his news sources. • • • The *Branzburg* Court dealt precisely with the first amendment free press provision as it affected testimony sought to be produced before a grand jury. However, the opinion appears to teach [sic] broadly enough to be applied to other civil or criminal judicial proceedings as well. Recent cases have so held." [citing Carey v. Hume, *supra,* and U.S. v. Liddy, *supra.*

Commentary in this relatively new field of *constitutionally* based privilege from disclosure is voluminous.[2] We

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[2] *Pre-Branzburg:*

Guest & Stanzler, The Constitutional Argument for Newsmen Concealing Their Sources, 64 N.W.L.Rev. 18 (1969); Blasi, The Newsmen's Privilege: An Empirical Study, 70 Mich.L.Rev. 229 (1971); Nelson, The Newsmen's Privilege Against Disclosure of Confidential Sources and Information, 24 Vand.L.Rev. 667 (1971); Note, Reporters and Their Sources: The Constitutional Right to a Confidential Relationship, 80 Yale L.J. 317 (1970); Note: The Newsmen's Privilege: Government Investigations, Criminal Prosecutions and Private Litigation, 58 Cal.L.Rev. 1198 (1970).

Post-Branzburg:

Note, 51 N.Caro. L.Rev. 562; Comment, A Need for Statutory Protection of News Sources, 61 Ky L.J. 551; Comment, Journalists & Their Sources, 58 Iowa L.Rev. 618; Note, 18 Villanova L.Rev. 288; Note, 41 Fordham L.Rev. 1024; Comment, Newsman's Privilege, 25 U.Fla.L.Rev. 381; Comment, Newsman's Privilege Statutes, 49 Notre Dame Lawyer 159; Comment, Ervin, In Pursuit of a Press Privilege, 11 Harv. J. on Legis. 233; Comment, The Journalist's Prerogative of Non-Disclosure, 20 Loyola L.Rev. 120; Com-

have reviewed them but as the tentmaker "came out by the same door where in [we] went" and no wiser. We are left to our own devices and what wisdom we may garner from authorities which may be persuasive although not binding.

We find agreement with the reasoning and rationale contined in the opinions of the Massachusetts and Oregon courts. We are also persuaded that the United States Supreme Court would, if presented the opportunity, uphold the view of the Massachusetts court as it has once already in *Pappas*.

The underlying rationale of the First Amendment protection of freedom of the press is clear. In a society so organized as ours, the public must know the truth in order to make value judgments, not the least of which regard its government and officialdom. The only reliable source of that truth is a "press" (which is to say everyone—pamphleteers, nonconformists, undergrounders) which is free to publish that truth without government censorship. We cannot accept the premise that the public's right to know the truth is somehow enhanced by prohibiting the disclosure of truth in the courts of the public.

The order, judgment and sentence of the trial court are affirmed.

McFADDEN, C.J., and SCOGGIN, D.J. (Ret.), *concur*.

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ment, Subpoenas to Compel Disclosure of Confidential Information, 49 Los Angeles Bar Bull. 133; Commnet, Journalists in the Courts, 8 U. San Francisco L.Rev. 664; Note, 9 U. Richmond L.Rev. 171; Note, Newsman's Source Privilege, 26 U. Fla. L.Rev. 453; Note, Dixon, Newsman's Privilege by Federal Legislation, 1 Hastings Const. Law Q. 39; Note, 53 Bost. U.L.Rev. 497; Note, Newsman's Privilege Two Years After Branzburg, 49 Tulane L.Rev. 417; Note, Grodde, The Developing Qualified Privilege for Newsmen, 26 Hastings L.J. 709; Note, 16 Santa Clara L.Rev. 379; Note, Murphy, Journalist's Privilege, 15 Texas L.Rev. 829.

DONALDSON, J., *dissenting*.

In every case involving an infringement of first amendment rights, whether the infringement is direct or indirect, one question is paramount. A court must decide whether there is a compelling interest justifying the infringement. Every first amendment case necessarily involves a balancing of competing interests. The interest in maintaining a robust first amendment must be balanced against whatever interest is asserted as justifying the impairment of first amendment freedoms. The balance is weighted in favor of the first amendment, however, in that the competing interest must be "compelling" or "paramount." And normally the burden of establishing a compelling interest is on the state. These principles have been given consistent endorsement by the United States Supreme Court. DeGregory v. Attorney General of New Hampshire, 383 U.S. 825 (1966); NAACP v. Button, 371 U.S. 415 (1963); Bates v. Little Rock, 361 U.S. 516 (1960); NAACP v. Alabama, 357 U.S. 449 (1958); Thomas v. Collins, 323 U.S. 516 (1945); Schneider v. State, 308 U.S. 147 (1939). Because the majority diverges from this well-established approach, I dissent.

The majority opinion does not expressly address the issue of competing interests. In fact, there is some doubt that the majority believes first amendment freedoms are even implicated. Two interests are implicated, however,—the interest in allowing the press unfettered access to sources of information and the interest in allowing court unimpaired access to testimony *in civil litigation*. These interests are in conflict and they have to be balanced. The case cannot be resolved simply by stating the general theory that new testimonial privileges are disfavored or by stating the importance courts have traditionally placed on compelling testimony in a lawsuit.

Nor can the case be resolved on the basis of *Branzburg*. The majority acknowledges that *Branzburg* was decided

in the context of criminal prosecution.[1] But, not surprisedly, given the approach of the majority opinion, it misses the import of this distinction. The immediate question before us is whether the admittedly important interest in compelling disclosure of relevant information in civil litigation should take precedence over the first amendment. In resolving this question, the authority that is most relevant is that which was decided in a civil context. *Branzburg* is a logical starting point, but is only that.

Branzburg.

Branzburg was a 5-4 decision in which Justice Powell wrote a concurring opinion. The four dissenters maintained that newsmen should enjoy either a qualified or absolute privilege.[2] The plurality opinion authored by Justice White rejected both claims, but it *did* recognize that newsgathering is entitled to first amendment protection.

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[1] The Supreme Court specifically limited its holding in *Branzburg:* "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime." Branzburg v. Hayes, 408 U.S. 665, 682.

An exact reading of the issues raised in the *Branzburg* trilogy further limits the Court's holding. The Court was presented with two issues, a reporter's appearance before a grand jury and his testimony to crimes *that he actually witnessed.*

[2] In an opinion authored by Justice Stewart, three of the dissenters adopted a qualified privilege.

"[T]he government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information." 408 U.S. at 743. (Stewart, Brennan and Marshall, JJ. dissenting).

Early in his decision, Justice White states "Nor is it suggested that newsgathering does not qualify for first amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated." Branzburg v. Hayes, *supra* at 681. At the end of his opinion he states, "Finally as we have earlier indicated, newsgathering is not without its First Amendment protections and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment." 408 U.S. at 707.

To be sure, the protection that Justice White would allow the first amendment is narrowly circumscribed. The opinion as a whole seems to indicate that first amendment protection would only exist when the newsgatherer could show that the grand jury proceedings were being used as a means of harassment. In addition, the burden of proving lack of food faith appears to be on the newsgatherer which is contrary to the traditional approach in first amendment cases. But what is significant is that Justice White reached this result by balancing the burden disclosure would place on newsgathering against the importance of disclosure to the criminal justice system. Justice White found the latter compelling. 408 U.S. at 690. The question in the present case is whether the interest in civil litigation is equally compelling.

It should also be noted that commentators and courts have not found *Branzburg* conclusive even in regard to the balance that should be struck between the first amendment and the needs of the criminal justice system. Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); State v. Peter, 315 A.2d 254 (Vt. 1974); Brown v. Commonwealth,

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Justice Douglas in a separate dissent stated that the first amendment demanded that reporters enjoy an absolute privilege. 408 U.S. 712. (Douglas, J., dissenting).

204 S.E.2d 429 (Va. 1974). Note, Goodale, Branzburg v. Hayes and the Developing Qualified Privilege for Newsmen, 26 Hastings L.J. 709 (1975); Comment, Right of the Press to Gather Information after Branzburg and Pell, 124 U. Penn. L. Rev. 166 (1975); Supreme Court, 1971 Term, 86 Har. L. Rev. 52, 137-48 (1972).

The seeds of disputation were sown in Justice Powell's concurring opinion. Justice Powell, although he was the fifth justice to join the *Branzburg* majority, allows the first amendment greater weight than the plurality opinion does. First of all, Justice Powell does not impose a burden of proof on either the newsgatherer or the government. Instead he maintains that:

> "the court—when called upon to protect a newsman from the improper or prejudicial questioning—would be free to balance the competing interests on their merits in the particular case." 408 U.S. at 710 n. *.

Secondly, Justice Powell expanded the scope of a newsgatherer's first amendment protection. In addition to being protected from grand jury proceedings conducted in bad faith, Justice Powell thought that a newsgatherer might seek a motion to quash or a protective order whenever he was

> "called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe his testimony implicated confidential source relationship, without a legitimate need of law enforcement." 408 U.S. at 710.

A majority of this Court contends that Powell's concurrence gives a newsgatherer immunity from disclosure only if a grand jury investigation is conducted in bad faith. Whatever the meaning of Powell's concurrence—and some commentators and courts contend that it establishes a

qualified privilege—it cannot be read as the majority reads it. If Justice Powell intended that when an "investigation is not being conducted in good faith [the newsman] is not without remedy," there would have been no reason for him to write a special concurrence. Justice White's plurality opinion conceded that much to the first amendment. The majority's interpretation bears no relation to the language of the opinion itself. Justice Powell explicitly stated that he did not think disclosure would be justified in a case when the requested information was "remote or tenuous to the subject of the investigation." 408 U.S. at 710.

Admittedly the opinion is opaque, but since Powell was the deciding vote, it cannot be cavalierly dismissed—especially in view of the pains to which Powell went in Saxbe v. Washington Post, 417 U.S. 483 (1974) to point out that his opinion in *Branzburg* was extremely limited.

> "I emphasized the limited nature of the *Branzburg* holding in my concurring opinion. 'The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or the safeguarding of their sources.' In addition to these explicit statements, a fair reading of the majority's analysis in *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment rights are not implicated." 417 U.S. at 859-860.

Justice Powell's concurrence has had important consequences in the application of *Branzburg*. In Bursey v. United States, *supra*, for example, the Court of Appeals for the Ninth Circuit deviated from the conclusion reached by the Branzburg plurality. In response to the government's contention that the first amendment is of no weight in grand jury proceedings, the court said:

> "No governmental door can be closed against the amendment. No governmental activity is immune from its force. That the setting for the competition between rights secured by the first amendment and antagonistic governmental interests in a grand jury proceeding is simply one of the factors that must be taken into account in striking the appropriate constitutional balance." 466 F.2d at 1082.

The court struck the balance in favor of the first amendment. The burden was on the government to establish that the

> "government's interest in the subject matter of the investigation is 'immediate, substantial, and subordinating,' that there is a 'substantial connection' between information it seeks to have the witness compelled to supply and the overriding governmental interest in the subject matter of the investigation, and that the means of obtaining information is not more drastic than necessary to forward the asserted governmental interest." 466 F.2d at 1083.

In short, the court accorded newsgathering a qualified privilege.

The newspaper reporters in *Bursey* had refused to answer 56 of the grand jury's questions. The court required them to answer only those questions that fell under the above standard. To that end the court distinguished between those questions regarding direct witnessing of possible criminal activity and those relating to newsgathering activities, even though the latter "might have something to do with conduct that might have criminal consequences." The newspapermen were required only to answer questions about criminal activity that they witnessed.

Although the *Bursey* decision was technically decided and released the day following *Branzburg,* the opinion

was undoubtedly written before it. Accordingly, the government moved for a rehearing arguing that the *Bursey* holding was inconsistent with *Branzburg*. Maintaining that the *Branzburg* holding was limited to its facts, the Ninth Circuit denied the government's motion. The court noted that it adhered to the *Branzburg* formulation that the government or a grand jury did not have to make a preliminary showing before the grand jury could ask questions of witnesses. Nor did *Bursey* permit a grand jury witness to refuse to identify a person whom he had seen committing a crime. Nothing in *Branzburg,* moreover, "purported to disavow the balancing standards" traditionally used in first amendment cases. Competing interests were balanced in *Bursey* and the balance was struck in favor of the first amendment. The court concluded:

> "We have reexamined our analysis of the factors involved in balancing the First Amendment rights against the governmental interests asserted to justify compelling answers to the questions here involved, and we have concluded that the balance we struck is not impaired by *Branzburg.*" 466 F.2d at 1091.

Special emphasis was placed on Justice Powell's concurring opinion. The court followed Powell's prescription that the 'balance of these vital constitutional societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." Branzburg v. Hayes, *supra* at 710.

For the purposes of this case it is unnecessary to attempt a clarification of the *Branzburg* decision.[3] The ulti-

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[3] I will only state parenthetically that I believe that Powell's concurrence does establish a qualified privilege. He explicitly states that under certain circumstances he would not force disclosure of sources. In other words, sources are privileged under certain circumstances.

mate meaning of the case will have to be determined by subsequent case law. It will suffice to say that *Branzburg* has not been given in a criminal context the weight that a majority of this Court gives it in a civil context.

The civil cases.

We come now to those cases that are most relevant to the outcome of this case—cases in which newsmen have been subpoenaed to testify in civil litigation. The first case decided in this area was Garland v. Torre, 259 F.2d 545 (2d Cir. 1958). The case arose when actress Judy Garland was described by Marie Torre in her Hehald Tribune column as overweight. Torre attributed the statement to an unnamed C.B.S. official. Garland sued C.B.S. and sought the identity of the person who had made the statement. After having deposed several officials at C.B.S., Garland sought to depose Torre. Torre refused to identify the source and as a consequence she was held in criminal contempt. After balancing the interests involved, the Court of Appeals for the Second Circuit found that the

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Whether Powell adopts the standards articulated in Stewart's dissent—relevance, exhaustion of alternative sources and compelling national interest in the testimony—is ambiguous. He accepts the relevance standard—he would quash a subpoena that requires a reporter to yield information "bearing only a remote and tenuous relationship to the subject of the investigation." 408 U.S. at 710 n. *. He adds in the same footnote, however, that Stewart's proposal "would impose heavy burdens of proof to be carried by the State." This statement can be interpreted in two ways. He intended either that the remainder of the Stewart test should fail because it was too burdensome, or that the burden of proof should be placed on the reporter rather than the state.

What is important is that Powell's opinion does allow a qualified privilege. The majority of this Court is therefore in error when it states that *Branzburg* does not privilege newsgathering. Five Justices, Powell and four dissenters, do adopt a qualified privilege.

identity of the source was crucial to the plaintiff's case and compelled disclosure.

What is significant for the purposes of this case, however is that Justice Stewart was careful to point out the qualified nature of the required disclosure.

> "It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality [citations omitted]. The question asked of the appellant went to the heart of the plaintiff's claim." 259 F.2d at 549-50.

The majority reads *Garland* incorrectly when it maintains that *Garland* does not establish a qualified privilege. The test applied by the court in *Garland* is very similar to the one Justice Stewart articulated in his *Branzburg* dissent. The *Garland* test demands (1) relevancy, (2) exhaustion of alternate sources and (3) that the requested information be of critical importance. A plaintiff is entitled to disclosure only if he satisfies all three requirements. Otherwise, the identity of a reporter's source is privileged.

The majority also incorrectly analogizes the facts of *Garland* to the facts of the present case. *Garland* is similar to *Caldero* in that a reporter refused to disclose the source of an alleged defamatory statement. The similarity ends there. The identity of the source was arguably crucial in *Garland* because unless he was in fact a C.B.S. official, an action would not lie against C.B.S. Garland sued C.B.S. not the newspaper that published the statement. The only relevance that the identity of the source has in *Caldero* is that an inference of malice would arise if the source did not exist or if the source was manifestly irresponsible. I do not believe that such would normally qualify under the *Garland* test as the heart of the plain-

tiff's case unless the plaintiff's claim already has some foundation without the identity of the source being known.

It also is important to note that *Garland* was decided before the monumental Supreme Court decision in New York Times Co. v. Sullivan, 376 U.S. 254 (1964).[4] The balancing process in *Garland* was based upon a common law premise that the interest of the reporter in protecting a source is a *private* one, which must yield to the superior public interest in the administration of justice. That premise was refuted by *New York Times.* Torre's claim for a constitutional justification for nondisclosure of her source was undermined by the fact that defamatory statements were considered outside the scope of first amendment protection. Had *Torre* been decided after *New York Times,* the result would have been different. Since *New York Times,* defamatory statements have been within the ambit of the first amendment. The thrust of *New York Times,* and its progeny is that the elements to be weighed in the balancing process in constitutional libel actions should be the *public* interest in the free flow of news and the plaintiff's private reputational interest. The real import of *Garland* is not, as the majority seems to think, that the court ordered disclosure of a confidential source. *Garland's* import is that although the statements involved were outside constitutional protection, the Second Circuit gave credence to the claimed privilege to protect a confidential source by insisting upon a strong showing of relevance prior to disclosure.

Civil cases decided since *Garland* have followed *Garland* in adopting a qualified privilege for newsgathering. Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974); Cervantes v.

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[4] Prior to Sullivan, there had been only occasional mention in defamation cases of the first amendment guarantees of free speech and free press. Sullivan introduced somewhat of a "bombshell" by holding that the first amendment itself required the privilege. Prosser, Law of Torts § 118 1971).

Time, Inc., 467 F.2d 986 (8th Cir. 1972); Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972).

Carey v. Hume, *supra,* involved an interlocutory appeal from a district court order directing a reporter to disclose his confidential sources. The Court of Appeals for the District of Columbia Circuit announced at the outset that the *Garland* approach should govern the outcome of the case. The court described the *Garland* approach as follows:

> "That approach essentially is that the court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired." 492 F.2d at 636.

The *Carey* court ordered disclosure, but it was careful to limit its holding to the specific facts of *Carey.* Jack Anderson had written a column stating that the United Mine Workers general counsel Edward L. Carey and U.M.W. President Tony Boyle had been seen improperly taking records from Boyle's office. Carey sued for libel and deposed Britt Hume, Anderson's colleague, who had supplied information for the article. Hume stated that a U.M.W. employee was the source for the statement, but declined to identify him.

The court found that the identity of Hume's source was critical to Carey's case. Hume testified that, according to his source, Carey and Boyle had confiscated the records over a protracted period of time. The court noted that it would be exceedingly difficult for Carey to introduce evidence beyond his own testimony that would prove that he did not "at any time of day or night over an indefinite period of several weeks" remove the documents from U.M.W. offices. 492 F.2d at 637. In addition, Anderson had based the allegedly defamatory article exclusively on the information supplied by the undisclosed source. There

were no corroborative sources. Lastly and most importantly, the record before the court indicated that Carey's claim was not frivolous.[5] Whether Carey would prevail hinged upon the identity of the source.[6]

In Cervantes v. Time, Inc., *supra,* the issue of disclosure had to be resolved in a procedural context different from *Carey,* but the underlying issue was the same—should the court compel disclosure. Life Magazine had published an article representing that Alfonso Cervantes, the Mayor of St. Louis, maintained business and social ties with organized crime. Cervantes sued and moved for an order to compel disclosure of the source of the article. Time, Inc. made a motion for summary judgment with accompanying affidavits refuting Cervantes' claim of malice. The district court granted Time's motion without reaching the merits of Cervantes' motion. Cervantes appealed. The Eighth Circuit found that in view of the plaintiff's burden under the *New York Times* malice standard, there was no reasonably probability that Cervantes would succeed in his libel suit. It therefore upheld the district court's grant of summary judgment even though the identity of Life's sources had not been revealed to Cervantes. The court's decision was based on the first amendment—"to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of the libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions ot be engrafted upon the enforcement of State libel laws." 464 F.2d at 993.

[5] The court stated, "In *Garland* the court was unable to say that the plaintiff's claim was frivolous. Neither can we conclude on the basis of the record before us that appellee's claim is without merit." 492 F.2d at 637.

[6] The court relaxed the requirement of *Garland* that a plaintiff exhaust alternative sources to uncover the identity of the undisclosed source before seeking disclosure from the reporter. In *Carey* any one of a multitude of U.M.W. employees could have provided the information on which Anderson based his article. The court concluded that it would be unreasonable to expect the plaintiff to interview all the employees of U.M.W. to discover the source of Hume's information. 492 F.2d at 638. However, to require Caldero to interview police experts in Idaho before he could compel disclosure would appear to be feasible, absent a showing that an attempt was made and that it proved impossible. In this case no such showing was made. I believe that *Garland* requires only that a plaintiff exhaust alternative sources when it is feasible to do so.

The majority is correct in noting that in *Cervantes* the Eighth Circuit affirmed the district court's grant of summary judgment against the plaintiff. It is incorrect in dismissing the import of the case for this reason. Cervantes major argument was that the district court erred in granting summary judgment without first mandating the disclosure of Life's confidential sources. The Eighth Circuit had to decide, in effect, whether the first amendment took primacy over the plaintiff's right to know the identity of Life's sources. Were it not for the intervention of the first amendment, Cervantes' claim would have had merit. The Eight Circuit's conclusion—that disclosure should be ordered only when "there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice"—is clearly relevant to the present case. 464 F.2d at 994. Expressed otherwise, *Cervantes* holds that the interest in compelling testimony takes precedence over the first amendment only when the information sought via disclosure is of critical importance to the plaintiff's case. The identity of a reporter's sources is privileged—if a plaintiff does not meet this standard, the court will not compel disclosure. This is merely a rephrasing of the *Garland* test that the requested information must go to the "heart of the plaintiff's claim."

The majority also errs when it dismisses the precedental value of Baker v. F & F Investment, *supra*.[7] A number of distinctions are cited by the majority, none of which refute the relevance of *Baker* to the present case. *Baker* came before the court as an interlocutory appeal from a district judge's decision refusing to compel a journalist to disclose confidential news sources. The district court reached its decision by balancing the public interest in a robust first amendment against the private interest in compelled testimony. The court concluded that the first amendment should prevail. On appeal the Court of Appeals saw the issue and its resolution as follows:

> "Appellants urge us to extend to this civil case the limited principle of Branzburg v. Hayes which held only that newsmen could be required to disclose confidential sources to a grand jury conducting a criminal investigation. We decline that invitation and affirm the order." 470 F.2d at 779-80.

The court followed the approach of *Garland*. In upholding the district court's decision it noted that (1) the plaintiff had not exhausted alternate sources, (2) he had not demonstrated relevance, and (3) he had not shown that the information was of critical importance. The contrary result raeched in *Garland* was distinguished on the facts of the case:

> "The facts in the *Garland* case are wholly unlike those before us. There the record revealed that Miss Garland had taken active steps independently to de-

[7] *Baker* was a civil rights class action brought in behalf of all Negroes in the City of Chicago who purchased homes from approximately 60 named defendants between 1952 and 1969. During discovery, plaintiffs exposed a journalist who had written an article on racially discriminatory real estate practices in the Chicago area. Plaintiffs wanted to know the identity of the real estate agent who provided information for the story.

> termine the identity of the confidential news source. Three C.B.S. executives were deposed; they denied making the statement in question and denied knowing the identity of the network executive referred to in the Herald Tribune column. In view of these denials, the identity of Miss Torre's source became essential to the libel action: in the words of this Court, it 'went to the heart of plaintiff's claim.' [citation deleted] Appellants in this case have not demonstrated that the identity of [the reporter's] confidential source is necessary much less critical to the maintenance of their civil rights action." 470 F.2d at 784.

The basic theme of *Garland, Carey, Cervantes,* and *Baker* is that newsgathering should enjoy a qualified privilege.[8] The respective courts reached this result by engaging the traditional first amendment balancing test. The courts set off the public interest in a robust first amendment against the private interest in compelled testimony. Equilibrium was reached by allowing a qualified privilege—courts would compel disclosure only when the plaintiff could show that the identity of the source was critical to his case. There were variations from court to court (*Garland* and *Baker* would require exhaustion of alternate sources), but each of the courts used this standard to delineate the limits of the privilege.

Whether a court should require disclosure in the individual case will depend upon the facts of the case. Disclosure can not be dictated in the abstract. The issue must be resolved on a case-by-case basis—in the words of Justice Powell, the "tried and traditional way of adjudicating such questions." Branzburg v. Hayes, *supra* at 710.

[8] In the related area of subpoenas duces tecum, courts have also given newsgathering a qualified privilege. Democratic National Committee v. McCord, 356 F.Supp. 1394 (D.C. Cir. 1973); Spiva v. Francouer, 39 Fla.Supp. 49 (Dade County Jud. Cir. 1973). Both cases quashed the subpoenas.

When these principles are applied to the present case, we find that the identity of the confidential source is privileged. Caldero has not even come close to establishing the critical importance of Shelledy's testimony.[9] Shelledy's undisclosed source merely expressed an opinion about the professional propriety of Caldero's conduct that was echoed by the county prosecutor and the state attorney general, both of whom were idenitfied in Shelledy's article. Furthermore, the uncontradicted deposition of the attorney general, who was Caldero's superior, confirmed the statements made in the news article. The statements themselves do not evince any inference of malice. Actual malice would have to be proved since the district court had already ruled that Caldero was a public official. Caldero's claim, moreover, is not supported by any other evidence. As was stated earlier, the only relevance that the identity of the source has in *Caldero* is that an inference of malice would arise if the source was either nonexistent or irresponsible. Critical importance cannot be established on such a meager basis. The identity of a source could be of critical importance only if plaintiff's allegations already had some basis in fact before disclosure. Then the identity of the reporter's source could have the pivotal importance envisioned by *Garland* and its progeny.

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[9] Caldero also has made no showing that he attempted to obtain the identity of Shelledy's source by alternative means less destructive of the first amendment freedoms.

BAKES, J., *dissenting:*

I disagree with the majority that this newsman must be compelled to reveal the identity of the undisclosed "police expert" quoted in his news story. I agree with Justice Donaldson that the First Amendment to the United States Constitution affords a newsman a limited privilege against disclosure of his news sources in some cases. However, assuming that the article was false and defamatory, I disagree with Justice Donaldson that the claim of constitutional privilege in this case would have outweighed the importance of discovery of the police expert because in my opinion this information would have been critical to the issue of malice. But since I do not believe that this article was false and defamatory of Caldero, I conclude that the First Amendment inteersts in a free press outweigh the discovery of this information.

I

First, I cannot agree with the majority that the First Amendment guarantee of a free press does not afford a limited privilege to newsmen protecting them from discovery of their sources. An examination of the United States Supreme Court's opinions in *Branzburg* and the many intermediate court cases in this area reveals that even where discovery is ultimately ordered, it is only after application of a balancing of First Amendment interests in a free press against the right of litigants to discovery of material information, and then narrowly prescribing the questions which must be answered. This approach of the courts is thoroughly analyzed by Justice Donaldson in his dissent.

I believe the most telling indication that a limited privilege does exist in those news source discovery cases is disclosed by a comparison of the approach taken by the courts in these cases with the general rule of discovery

laid out in I.R.C.P. 26(b)(1), which is identical to the comparable federal rule:

> "RULE 26 (b)(1). SCOPE OF DISCOVERY IN GENERAL.—Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) *Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved* in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appear reasonably calculated to lead to the discovery of admissible evidence.*" (Emphasis added).

This rule has consistently been interpreted to allow the broadest possible discovery; in Hickman v. Taylor, 329 U.S. 495 (1947), a case in which the U.S. Supreme Court discussed the scope of discovery under this rule, that Court observed:

> "No longer can the time-honored cry of fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." 329 U.S. at 507.

The only limitation on discovery of unprivileged material is that it be relevant to the subject matter of the litigation, which is such a broad standard that at the discovery stage a party may in fact engage in a fishing expedition. 8 Wright & Miller, Federal Prac. & Proc., § 2008.

If there is no limited newsman's privilege, how can the following passage from Garland v. Torre, 259 F.2d 545 (2d Cir. 1958), be reconciled with the broad discovery rules outlined above?

> "It is to be noted that we are not dealing here with the use of the judicial process to force a wholesale disclosure of a newspaper's confidential sources of news, nor with a case where the identity of the news source is of doubtful relevance or materiality. [Citations omitted]. The question asked of the appellant went to the heart of the plaintiff's claim. We hold that the Constitution conferred no right to refuse an answer." 259 F.2d at 549-550.

The "heart of the claim" test was also adopted in Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974), wherein that Court observed:

> ". . . *Branzburg,* in language if not in holding, left intact, insofar as civil litigation is concerned, the approach taken in *Garland.* That approach essentially is that the court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired." 492 F.2d at 636.

Clearly, that court recognized that a limited privilege existed. Its holding that the newsman could be compelled to reveal his sources was arrived at by the balancing process it describes, which is a far contrast from the broad discovery provisions of Rule 26(b)(1).

In Baker v. F & F Investment, 470 F.2d 778 (2d Cir. 1972), the Second Circuit upheld the trial court's refusal to compel disclosure of a newsman's sources because it found no "concern [in this case] so compelling as to override the precious rights of freedom of speech and

the press." 470 F.2d at 785. Again, the court was recognizing a limited privilege and so refused to allow broad discovery as provided by Rule 26(b)(1).

In this case, even while the trial court and the majority of this Court have held that the reporter here was not privileged to refuse to disclose his sources, the scope of the discovery ordered is limited to three questions, *ante* at 3, and the trial court rejected the plaintiff's request for discovery of answers to several collateral questions. But if "no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version," as the majority states, *ante* at 11, there should be no reason why the plaintiff in this case is not afforded the right to broad discovery given all parties in civil litigation under Rule 26(b)(1)—in short, a fishing expedition. This very inconsistency in the trial court's limiting order and the majority's holding reveals that they have also done some balancing between the First Amendment right of free press and the right of litigants to information.

I agree with Justice Donaldson that the First Amendment to the United States Constitution affords a limited privilege against disclosure of sources in cases where such disclosure is not critical to an issue in the case. This limited privilege protects a newsman from broad discovery of his sources under Rule 26 (b)(1), But he may be compelled to disclose certain information if a court concludes that a party's interest in obtaining that information outweighs the newsman's limited First Amendment privilege.

I disagree with Justice Donaldson, however, in his conclusion that discovery of the police expert would not have been critical in this case if this were a true case of defamation. However, because I do not believe that the article in question is defamatory of Caldero, I conclude that it would serve no purpose to allow discovery of the police

expert and that in this case the interest in discovery is outweighted by the newsman's First Amendment privilege.

II

The newspaper article that is the subject of this litigation covered a full page of the November 23, 1973, edition of the Lewiston Morning Tribune. The headline read, "'You shot me . . . you really shot me!' Young father gunned down by state narc in Coeur d'Alene park when he panics after friend accosted by 'hippies.'" The article describes the facts leading up to the narcotics transaction and the shooting of the victim Johnson, mostly from Johnson's perspective. The article quotes Johnson extensively, and also quotes the prosecuting attorney of Kootenai County, the then Attorney General, a witness of the incident, Johnson's attorney, and the unidentified police expert. The tone of the article is sympathetic toward the victim Johnson, who subsequently pleaded guilty to a charge of possession with intent to sell, and is generally critical of the manner in which the incident was handled by Caldero. The passage quoting the police expert supported this generally critical tone.

In his complaint filed against the Tribune Company, Caldero alleged that the article "was an unfair, false and malicious account of the shooting incident which involved the plaintiff on August 27, 1972, and as such the publication was not privileged by the defendant but was a libelous and defamatory publication on the part of the defendant." His affidavit filed in support of plaintiff's motion to compel discovery merely alleged that "such questions are material and relevant to the issues herein, and answers thereto should be required." In his deposition, Caldero was asked by the defendant to identify those passages of the article which he contended were false and libelous. Caldero went through the article, paragraph by paragraph, contending that certain statements were factually inaccurate, or that he disagreed with Johnson's

version of the facts, or that the Attorney General and the prosecuting attorney had not made certain statements that were attributed to them in the article. None of these accusations of themselves could be considered defamatory. Concerning the passage at issue in this case, Caldero contended that the expert's opinion was speculative, and that he did not believe that such a police expert existed. He contended that this opinion made it appear the he, Caldero, had lied in his version of the facts, but he did not disagree with any of the factual assertions underlying the opinion of the police expert.

Caldero's deposition concludes with the following colloquy between Caldero and his counsel:

> "Q. Mr. Caldero, in response to counsel's question as to the specific untrue parts of the article, can you state that any of those things taken by themselves are libelous to you, in and of themselves as picked apart by counsel?
>
> "A. Very few of them sir, would in themselves mean much.
>
> "Q. All right.
>
> "A. But all lumped together they would mean a great deal.
>
> "Q. You have alleged in your complaint that the article was an unfair, false and malicious account of the incident. Is that the article taken as a whole?
>
> "A. Yes sir." Clk.Tr., p. 105.

The trial court had ruled that Caldero was a public official and therefore in order to prevail in this defamation action he is bound by the rule of New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964), that "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct

unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-280. While the *New York Times* case became a landmark for its articulation of the actual malice standard in defamation cases, the actual holding in that case went further and the Supreme Court ruled that the publication in that case could not constitutionally be said to be defamatory of the plaintiff because the publication could not reasonably be interpreted as referring to the plaintiff. Such is not the concern in this case since Caldero is clearly identified in the article; however, I believe that based on the position taken by Caldero in his deposition and pleadings, and after a careful reading of the article itself, it cannot be said that the article has defamed Caldero, and therefore the search for actual malice in the publication becomes irrelevant.

I believe that a case directly in point is this Court's recent decision in Hemingway v. Fritz, 96 Idaho 364, 529 P.2d 264 (1974). In that case a public official sued a newspaper publisher alleging that a news article and editorial that it had printed about him were libelous. The publication in that case was critical of the official and of certain actions he had taken in office. This Court affirmed the trial court's grant of summary judgment to the defendant, and we observed:

> "Critical statements aimed at public officials and their conduct in relation to their public trust should not be microscopically examined. Rather, 'the article must be read and construed as a whole.' [Gough v. Tribune-Journal Co., 75 Idaho 502, 508, 275 P.2d 663 (1954)]. Reading the article and editorial as a whole, we do not feel that Hemingway has been untruthfully accused of a misuse of his public office. Whatever impropriety he may feel he has been accused of by

> the use of 'privileged information' in bidding, Hemingway in his deposition in essence admitted the essential facts in the publications. . . ." 96 Idaho at 365-366.

It is important to note that the plaintiff in *Hemingway* also sought discovery of an alleged informant, but this Court stated that since the articles in question were not defamatory, discovery of the informant was irrelevant. 96 Idaho at 366.

The basic facts surrounding the incident in the Couer d'Alene park, as described in the Tribune article, are not disputed by Caldero. His contention is that he has been harmed by the overall tone of the article which was critical of his handling of the situation. However, as a public official, Caldero cannot attempt to stifle public criticism of his actions by means of a defamation suit. As this Court stated in Weeks v. MP Publications, Inc., 95 Idaho 634, 516 P.2d 193 (1973):

> "The appellants as public officials in the exercise of their officials duties are not immune from the criticism and censure of public debate. The appellants voluntarily entered the arena of public debate and should not complain over ribald or robust criticism of their public action. Political epithets and hyperbole leveled against the actions of public officials are within the freedom of expression protected by the First Amendment afforded to citizens criticizing the function of their government." 95 Idaho at 639.

The "fair comment" doctrine is of common law origin, antedating the *New York Times* rule. Comment or opinion upon the conduct of public officials in their office, critical or otherwise, has long been exempt from liability in defamation actions. Prosser, Law of Torts, 4th ed., § 118, p. 819.

In light of the fact that I believe that the article in question is not defamatory of Caldero, it would serve no purpose to allow discovery of the unidentified police expert, and therefore under the circumstances here, I would reverse the order of the district court holding appellant Shelledy in contempt.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1848

TRIBUNE PUBLISHING COMPANY and
JAMES E. SHELLEDY, *Petitioners,*

v.

MICHAEL A. CALDERO, *Respondent.*

IN RE SHELLEDY

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

Brief Amicus Curiae of THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, in Support of Petitioners

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The Idaho Supreme Court ruled that Branzburg v. Hayes denied any First Amendment protection for the identities of confidential news sources and therefore the assertion of this First Amendment right must always yield to the state statutory right of pre-trial discovery.

It is the position of the Amicus that the Idaho Supreme Court decision contradicts this Court's recognition of the importance of confidential news sources in Branzburg v. Hayes; contradicts the ruling of most state and federal courts which have recognized the balancing test theory of Branzburg v. Hayes; contradicts the philosophy of New York Times v. Sullivan, protecting news organizations from per se liability unless there is a showing of recklessness; and contradicts the rulings of three U.S. Courts of Appeals, starting with Garland v. Torre, that the libel plaintiff has a substantial evidentiary burden to meet before forcing the news organization to disclose its sources.

Therefore, the specific question in this case is whether a state pre-trial discovery rule grants a public official libel plaintiff an absolute right to force disclosure of confidential news sources even though the news organization has offered substantial evidence that the article was done carefully, and even though the public figure libel plaintiff has offered no evidence to rebut the presumption of care and offered no balancing test evidence of compelling need.

It is the position of the Amicus that the Idaho Supreme Court decision, if permitted to stand, will encourage frivolous and harrassing libel suits against the press filed only to discover confidential news sources.

The news organization and news reporter will be helpless to defend because the Idaho Supreme Court has rejected the concept that the libel plaintiff must make any initial showing of malice and necessity before obtaining the forced disclosure.

In view of the importance of this question to the First Amendment doctrines of Branzburg v. Hayes and New York Times v. Sullivan and in view of the conflict on this question between the Idaho Supreme Court and the U.S. Courts of Appeals, Amicus urges this Court to grant the petition for a writ of certiorari so that public figure libel plaintiffs, news organizations and the public may have some guidance as to what the law is in this vital First Amendment area.

OPINIONS BELOW

The District Court of the Second Judicial District of the State of Idaho, in and for the County of Latah, rendered no opinion. The opinion of the Supreme Court of the State of Idaho, not yet officially reported, is set forth in Joint Appendix A filed by the parties.

CONSENT OF THE PARTIES

All parties to this litigation by their attorneys, have consented to the filing of this brief.

STATEMENT OF INTEREST

The Reporters Committee for Freedom of the Press is a legal defense and research fund specializing in defending the First Amendment interests of the working press, and it has extensive expertise regarding the importance of protecting confidential news sources from the viewpoint of the working news reporter. The Committee has submitted briefs and memoranda Amicus Curiae before this Courtin a number of important First Amendment cases, including Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976); Times-Picayune Publishing Corp. v. Schulingkamp, 419 U.S. 1301 (1974) (stay granted); Times-Picayune Publishing Corp. v. Schulingkamp, 420 U.S. 985 (1975)(dismissed as moot); Rosato v. Superior Court, cert. denied,427 U.S. 912 (1976); United States v. Dickinson, cert. denied,414 U.S. 979 (1973); Oklahoma Publishing Co. v. District Court, rev'd, ___ U.S. ___, 45 U.S.L.W. 3599 (U.S. March 7, 1977).

The Reporters Committee believes it can present this Court with important facts and arguments not brought to this Court's attention in the Petitioners' brief and appendix on the high standard of journalistic care employed by the newspaper and news reporter.

Based on these facts, the Amicus believes that there is substantial argument to be made for the protection of the confidential news sources in this case.

QUESTIONS PRESENTED

1. Whether the Idaho Supreme Court was correct in ruling that the First Amendment offers no protection for confidential news sources sought in civil cases under Branzburg v. Hayes and Garland v. Torre.

2. Whether the Idaho Supreme Court was correct in ruling that the First Amendment permits a public figure libel plaintiff to obtain confidential news sources without making any showing of malice or any threshold "balancing test" showing of necessity to obtain the information.

3. Whether the Idaho Supreme Court was correct in ruling that a strong and unrebutted showing of journalistic care in the publication of a news article is no defense under the First Amendment to a demand by a public figure libel plaintiff for confidential news sources.

4. Whether this Court should grant review of this case in order to resolve the increasing confusion regarding protection for confidential news sources in libel cases stemming from conflicting decisions by three United States Courts of Appeals and two state supreme courts to date.

STATEMENT OF THE CASE

1. Background of the Article at Issue

This case involves a classic investigative reporting effort by a small daily newspaper, The Lewiston (Idaho) Tribune (circulation 25,000), into a highly controversial state agency, the Idaho Bureau of Narcotics and Organized Crime.

A. The Six-Part Series

Starting in 1972 the state agency was subjected to increasing criticism for its operations. As a result, the Lewiston Tribune assigned a reporter, Jay Shelledy, to investigate the agency.

This investigation took place over a period of several months beginning in September 1973 and resulted in the publication of a six-part series about the agency. Lewiston Tribune -- Sept. 15, 1973, p. 1; Sept. 29, p. 1; Oct. 4, p. 1; Nov. 18, p. 5; Jan. 28, 1974, p. 1; Jan. 30, p. 1. The controversy about the Bureau was chosen by the Idaho Associated Press as the most significant news event of the year. (Lewiston Tribune, Dec. 27, 1973, p. 2).

The general conclusions reached by the newspaper in its investigation were that agents were poorly trained and the agency was poorly supervised.

B. The Law Enforcement Assistance Administration and Colorado Bureau of Investigations Reports

During the controversy over the Bureau, the agency was assessed in depth by two outside government agencies: the Law Enforcement Assistance Administration of the Department of Justice (LEAA) and the Colorado Bureau of Investigations.

The LEAA report was never made public in its entirety but it was reported on January 28, 1974 (Lewiston Tribune, p. 1) that the LEAA "performance audit stains Idaho Narcotics Bureau". The report criticized the agents' training and management.

Two days later, on January 30, the Colorado Bureau of Investigation report reached similar conclusions about poor agent training and management. (Lewiston Tribune, p. 1).

C. Results

As a result, the State Attorney General discharged the Chief of the Bureau and four other top officials, including the libel plaintiff in this case, Michael Caldero, and his partner, agent Terry Perkins (Lewiston Tribune, Jan. 30, p. 1), both of whom were involved in the incident which prompted this libel suit.

2. The Article in Question

A. The Incident

On August 27, 1972, George Booth asked a friend, Dale Johnson, to drive him to a parking lot in a public park in Coeur d'Alene, Idaho, to keep an appointment.

Booth left the car to meet two men who later turned out to be undercover agents, plaintiff Michael Caldero and Terry Perkins.

Johnson remained in the car, parked in a parking lot. The two agents attempted to arrest Booth, who resisted.

Johnson said he thought his friend was being assaulted by "hippies" and started to flee.

At this point there is a dispute in the stories. Caldero said he identified himself as a policeman, showed his badge,and told Johnson to stop the car, and that Johnson attempted to run the officer over, whereupon Caldero shot Johnson three times, allegedly in self-defense. (See A. App. A, G)

Johnson said that Caldero did not identify himself, but merely ran up to the car and shot three times. He said he was not attempting to strike Caldero with the car.

B. The Publicity at the Time

After the incident, police released a short statement reporting that Dale Johnson had been injured while police were arresting a "suspected dope pusher". There was no indication at the time from police that the incident was other than a routine drug arrest. No assault charges were filed against Johnson. (See A. App. A).

Both men were convicted on drug charges. Johnson received probation.

3. The Investigation by the Newspaper: Its Evidence of Journalistic Care

The details of the investigation by Shelledy and the close supervision of the investigation by the Editor, the Editorial Page Editor and the Managing Editor are carefully outlined in a series of documents, including affidavits, the story itself, and a deposition by Shelledy. (See A. App. B, Deposition of James E. Shelledy; A. App. C, Affidavit of James E. Shelledy; A. App. D,

Affidavit of Ladd Hamilton, Managing Editor of the Tribune; A. App. E, Affidavit of A.L. Alford, Editor and Publisher of the Tribune; A. App. F, Affidavit of William D. Hall, editorial page editor for the Tribune; and A. App. G, Defendants' Brief.)

In brief, Shelledy recounted a vigorous investigation of the incident, including a two-day trip to Coeur d'Alene, inspection of many documents, and about 12 interviews. Included among those interviewed were the victim's attorney; members of the victim's family; the victim's employer; the County Sheriff; the County Prosecuting Attorney; the Coeur d'Alene Police Chief; a resident narcotics agent in Coeur d'Alene; the Chief of the State Narcotics Bureau; the Assistant Chief of the State Narcotics Bureau; the State Attorney General; two eyewitnesses who were unconnected to either the victim or the agent; and an unnamed "police expert". (See A. App. C.)

The reporter made efforts to obtain the police investigation reports of the incident but Coeur d'Alene police would not release the information. (See A. App. A.) He obtained the permission of the Attorney General and the County Prosecutor to interview the two agents, but the Chief of the Bureau ordered them not to talk to the newspaper. (See A. App. B.)

The newspaper, hoping to obtain a Caldero interview, offered to permit the agent to see the article before it was printed, and held up publication for more than two weeks in the hope it could obtain the interview.

4. The Article As Published

The article as published (see A. App. A) gives both sides of the incident, although most persons interviewed appear to support the victim's version of what occurred.

The State Attorney General was quoted as saying the shooting was a "mistake", and that in all likelihood Caldero "got a little shook up".

The County Prosecutor, who had access to reports unavailable to the newspaper, was quoted as saying that he "doesn't feel Johnson is the type who would do what Caldero charged".

The unnamed police expert -- who was used in previous stories and considered by the newspaper to be reliable (see A. App. B)-- said that, based on all the facts, Caldero's "justification for shooting didn't add up".

One eyewitness passerby contested the agent's statement in many respects, saying that Caldero did not verbally identify himself, did not say halt, or show any ID. This eyewitness and a companion also said that at no time was Caldero in danger of being run down. "He just ran up to the car and pumped three shots through the windshield." (See A. App. A.)

5. The Libel Suit

After the article was published, agent Caldero filed suit for libel claiming that the article was an "unfair, false, and malicious account".

In subsequent court papers, the agent did not accuse the newspaper of misquoting anyone but appears mainly to have taken issue with Shelledy's assessment of the facts and the statements by the unnamed police source that Caldero's version "didn't add up" and by the State Attorney General that Caldero "got a little shook up".

6. Demand for Confidential News Source

During this pre-trial stage, Caldero subpoenaed the reporter under Idaho pre-trial discovery rules. (Idaho Code §9-201, §9-1301). The reporter answered many questions in detail in a 30-page deposition (see A. App. B) but declined to produce his confidential "police expert". Shelledy was then added as a defendant.

The newspaper made a motion for summary judgment, producing the articles, the affidavits, and the deposition to raise the inference that it had published the story carefully and in good faith.

The trial judge indicated he would grant summary judgment (Joint App., p. 4a) were it not for the refusal to disclose the source.

The trial court held the reporter in contempt and sentenced him to 30 days in jail, staying execution of the judgment pending appeal.

7. The Idaho Supreme Court

The Idaho Supreme Court, in upholding the contempt judgment, ruled that "no newsman's privilege against disclosure of confidential sources founded on the First Amendment exists in an absolute or qualified version..." under Branzburg v. Hayes. (Joint App. at 13a)

It further said that "we read the opinion of Mr. Justice Stewart as rejecting both alternatives" in Garland v. Torre. Id. at 8a.

Therefore, the Idaho Supreme Court concluded that no showing of necessity under the "balancing test" was required in order to obtain the disclosure order, and that the unrebutted showing by the newspaper as in this case

could not defeat the disclosure order.

There were two dissents.

Justice Donaldson would have imposed the "balancing test". He observed that "there is some doubt that the majority believes First Amendment freedoms are even implicated." Id. at 23a.

Justice Bakes would have reversed the order, saying: "because I do not believe that the article in question is defamatory of Caldero, I conclude that it would serve no purpose to allow discovery of the police expert and that in this case the interest in discovery is outweighed by the newsman's First Amendment privilege". Id. at 42a.

Petitioners then sought review by writ of certiorari in this Court.

SUMMARY OF ARGUMENT

We respectfully suggest that the time has come for this Court to take up the question of the extent to which the First Amendment protects confidential news sources sought in civil litigation, especially libel cases.

It has now been six years since this Court decided Branzburg v. Hayes and ruled that three reporter eyewitnesses to the commission of serious crimes must go to jail or compromise their First Amendment interest in protecting the confidentiality of their news sources.

In the interim, this Court has had several opportunities to amplify Branzburg and has declined to do so. Baker v. F & F Investment Co., 470 F.2d 778 (2d Cir. 1972), cert.denied, 411 U.S. 966 (1973); Carey v. Hume, 492 F.2d 631 (D.C. Cir.), cert.denied, 417 U.S. 938 (1974); Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir.), cert. denied, 409 U.S. 1125 (1972); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied, 427 U.S. 912 (1976); Rosato v. Superior Court of Fresno County, 51 Cal. App. 3d 190 (1975), cert. denied, 427 U.S. 912 (1976).

Meanwhile, a debate has arisen on what Branzburg means. Generally, the federal courts, relying strongly on Mr. Justice Powell's concurrence, have ruled that Branzburg establishes, at a minimum, a "balancing test" in both civil and criminal cases which requires some showing by the person seeking the sources that the disclosure is relevant, essential to the underlying cause of action, and not obtainable through other non-press sources.

But two State Supreme Courts, Idaho and Massachusetts, have ruled that Branzburg offers absolutely no qualified privilege to protect news sources, and therefore the person seeking the information need make no showing of any type before obtaining a disclosure order.

This general conflict has been duplicated specifically in the libel field where federal appeals courts -- relying on Branzburg v. Hayes, Garland v. Torre and New York Times v. Sullivan -- have ruled that a public figure libel plaintiff seeking confidential news sources must make a threshold showing that the news organization was reckless before obtaining the disclosure order.

The result of the Idaho decision -- which rejects both the balancing test and the resulting threshold showing test -- is to leave the news organization and news reporter constitutionally defenseless when pre-trial discovery is demanded of confidential news sources, regardless of how improbable the libel claim.

On both a constitutional and practical level, the Idaho Supreme Court establishes an almost irrebuttable presumption of the right to force disclosure of confidential news sources and offers no presumption or burden of proof protection for the First Amendment values involved because the Idaho Supreme Court states there is no such First Amendment value.

Therefore, it is the contention of the Amicus that this Court should either summarily reverse the Idaho Supreme Court decision as an unwarranted violation of the First Amendment rights of the press under Branzburg v. Hayes and New York Times v. Sullivan, or it should grant the petition for a writ of certiorari

In order to resolve the confusion and conflict between the Idaho and Massachusetts Supreme Court decisions of no qualified privilege on the one hand and the positions of the United States Courts of Appeals for the Second, Fifth, Eighth and Ninth Circuits and District of Columbia Circuits that there is a qualified privilege under a "balancing test" or threshold showing rule.

I. THIS COURT, ALL LOWER FEDERAL COURTS AND MOST STATE COURTS HAVE RULED THAT THERE IS A STRONG FIRST AMENDMENT INTEREST IN PROTECTING THE IDENTITIES OF CONFIDENTIAL NEWS SOURCES.

The Idaho Supreme Court ruling, that there is no First Amendment interest in protecting the identities of confidential news sources, contradicts the rulings of this Court in Branzburg v. Hayes and the rulings of all federal courts and most state courts which have dealt with this question.

A. Branzburg v. Hayes

It is clear that the majority in Branzburg v. Hayes, 408 U.S. 665 (1972), specifically recognized that the First Amendment provides "some" constitutional right of the press to protect confidential news sources when it said: "Without some protection for seeking out the news, freedom of the press could be eviscerated." 408 U.S. at 681.

The fifth majority vote was cast by Mr. Justice Powell in his separate concurring opinion which said in part:

> The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources. [408 U.S. at 709.]

Mr. Justice Powell gave a further explanation of his view of Branzburg in Saxbe v. Washington Post Co., 417 U.S. 843 at 859 (1974), when he said:

> We recognized explicitly [in Branzburg] that the constitutional guarantee of freedom of the press does extend to some of the antecedent activities that make the right to publish meaningful.

It is the position of the Amicus that "seeking out the news" is certainly one of the "antecedent

activities" of publishing a newspaper, and the protection of confidential news sources is essential to effective newsgathering.

B. Lower Federal Courts

All federal courts which have dealt with the issue of confidential sources have recognized the First Amendment right.

The Court of Appeals for the Second Circuit, in Baker v. F&F Investment Co., 470 F.2d 778 (1972), cert. denied, 411 U.S. 966 (1973), ruled:

> Compelled disclosure of confidential sources unquestionably threatens a journalist's ability to secure information that is made available to him only on a confidential basis ... The deterrent effect such disclosure is likely to have upon ... investigative reporting ... threatens freedom of the press and the public's need to be informed.[470 F.2d at 782.]

This approach has also been followed by the Fourth Circuit in United States v. Steelhammer, 539 F.2d 373 (1976); by the Fifth Circuit in Poirier v. Carson, 537 F.2d 823 (5th Cir.), rehearing denied en banc, 541 F.2d 281 (1976); by the Eighth Circuit in Cervantes v. Time, 464 F.2d 986, cert. denied, 409 U.S. 1125 (1972); by the Ninth Circuit in Bursey v. United States, 466 F.2d 1059 (on petition for rehearing en banc); and by the District of Columbia Circuit in Carey v. Hume, 492 F.2d 631, cert. denied, 417 U.S. 938 (1974).

The United States District Courts have also consistently ruled that the First Amendment grants at least a qualified protection from the forced disclosure of confidential news sources.

In Gilbert v. Allied Chemical, 411 F.Supp. 505, 50[illegible] (E.D. Va. 1976), the District Court found that "information lost to the press is information lost to the public." See Loadholtz v. Fields, 389 F.Supp. 1299 (M.D. Fla. 1975), and Democratic National Committee

v. McCord, 356 F.Supp. 1394 (D.D.C. 1973).

C. State Courts

Most state courts, citing Branzburg v. Hayes, have ruled in favor of the First Amendment protection of news sources. In People v. Marahan, 81 Misc. 2d 637, 368 N.Y.S. 2d 685 (1975), a New York State Supreme Court held:

> The right to disseminate news in the printed columns of a news organ is necessarily meaningless without the same guarantee extended to the gathering and collection of the news ... To require (the reporter) to respond to the subpoenaes and subject himself to interrogation would perforce compel him not only to divulge his sources of information but to invite an open challenge to the right of newspapermen to write, edit and collect the news. [368 N.Y.S. 2d. at 692.]

Similar rulings have been rendered by the Vermont Supreme Court in State v. St. Peter, 132 Vt. 266, 315 A.2d 254 (1974); the Virginia Supreme Court in Brown v. Commonwealth, 214 Va. 755, 204 S.E.2d 429, cert. denied, 419 U.S. 966 (1974); and from the Florida Supreme Court in State v. Morgan, 337 So. 2d 951 (Fla. 1976).

Only one other state supreme court, the Supreme Judicial Court of Massachusetts in Dow Jones & Co., Inc. v. Superior Court, 303 N.E. 2d 847 (1973), agrees with the Idaho Supreme Court that Branzburg v. Hayes provides no privilege of any type under the First Amendment for news organizations and newspersons to protect the identity of confidential news sources.

D. Conclusion

Therefore, it is the position of the Amicus that the Idaho Supreme Court decision must be reversed on its face as a violation of the First Amendment protection of confidential news sources.

II. THE SUPREME COURT, ALL FEDERAL APPELLATE AND TRIAL COURTS, AND MOST STATE COURTS HAVE ESTABLISHED A "BALANCING TEST" WHICH REQUIRES A SHOWING OF "COMPELLING" INTEREST TO OVERRIDE THE FIRST AMENDMENT PRIVILEGE FOR THE PROTECTION OF CONFIDENTIAL NEWS SOURCES.

A. Balancing Test: Branzburg v. Hayes

In Branzburg v. Hayes, this Court recognized the need to balance the First Amendment interest of reporters protecting confidential news sources against the obligation "to respond to grand jury subpoenaes and to answer questions relevant to an investigation into the commission of crime." 408 U.S. at 682.

The Court ruled 5-4 that the First Amendment interest in protecting confidential news sources could be breached in those three cases because (a) the information sought by federal and state grand juries involved serious criminal allegations -- threats against the life of the President, potential violence by armed militants and hard drug transactions; (b) the reporters themselves were eyewitnesses to the alleged commission of these serious crimes; and (c) the reporters were the only available witnesses and no alternative non-media witnesses could be found. Branzburg v. Hayes, 408 U.S. at 667, 672, 675.

It is significant that the majority opinion by Mr. Justice White reached this conclusion by balancing the burden that disclosure would place on newsgathering against the importance to the criminal justice system based on the record in the three cases:

> On the records now before us, we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential ... burden on newsgathering...." [Id. at 690.]

The Court's approval of the balancing test was further noted by Mr. Justice White when he said that the Attorney General's Guidelines for Subpoenaes to the News Media "are a major step in the direction the reporters ... desire to move" and "may prove wholly sufficicient to resolve the bulk of disagreements ... between press and federal officials." Id. at 707, citing 28 C.F.R. § 50.10 (1976).

These Guidelines, as the Court noted, follow the "balancing test" theory by stating that the Attorney General, in deciding whether to issue a subpoena to the press, should "weigh that limiting effect [on the First Amendment] against the public interest to be served in the fair administration of justice." [408 U.S. at 707 n.41.]

Specifically, these Guidelines require that particular factors be considered in both civil and criminal cases in balancing the interests of the press and of the party seeking disclosure: (1) the information sought to be disclosed must be essential to the underlying litigation, particularly with reference to establishing guilt or innocence; (2) the party seeking disclosure must attempt to obtain the information from alternative non-media sources; and (3) the scope of the information sought must not be so broad as to constitute an undue burden on the news media.

Further, Mr. Justice Powell, the fifth Justice to join the Branzburg majority, granted the First Amendment "balancing test" great weight when he said:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. [Id. at 710.]

Later, in Saxbe v. Washington Post Company, supra, Mr. Justice Powell said that the holding in Branzburg was of a "limited nature" which

> hinged on an assessment of the competing societal interests involved in that case rather than on any determination that First Amendment freedoms were not implicated. ...
>
> At some point official restraints ... may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulation in terms more compelling than discretionary authority and administrative convenience. [417 U.S. at 860.]

Therefore, Branzburg only permits limitations upon First Amendment rights to protect confidential news sources when imposed pursuant to an express "balancing of interests" test. The post-Branzburg case law has tended to draw this balance more frequently in favor of First Amendment interests in both criminal and civil contexts.

B. Balancing Test: Criminal Cases -- State

Most state courts have recognized the First Amendment "balancing test" even in criminal cases where the identities of confidential news sources are sought.

Thus, in Brown v. Commonwealth, supra, the Virginia Supreme Court barred a murder defendant from forcing a newspaper reporter to divulge the identity of a confidential news source who had given the reporter an account of the crime. The court held that "the privilege of confidentiality should yield only when the defendant's need is essential to a fair trial." 204 S.E. 2d at 431.

In State v. St. Peter, supra, several drug defendants moved pre-trial to compel a reporter to

disclose his source of information about a drug raid warrant pursuant to which the defendants had been arrested.

The Supreme Court of Vermont held that the reporter was entitled to refuse to answer inquiries put to him because it could not be demonstrated that (1) there were no other adequately available sources for the information sought,and (2) the information sought was relevant and material to the issue of guilt or innocence.

The Court limited the scope of Branzburg to grand jury proceedings and trials and endorsed Mr. Justice Powell's view of the "balancing test":

> The concurring opinion of Mr. Justice Powell suggests that the First Amendment supports enough of a privilege in newsgatherers to require a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct. [315 A.2d at 255.]

In People v. Marahan, supra, a New York Supreme Court prohibited criminal defendants from compelling a reporter to testify about conversations he had with the arresting officers and to produce any notes or memos that he made at the time of his coverage of a story detailing the arrest of the two defendants and the seizure of weapons. The information supplied by the source indicated a conflict in police testimony regarding the validity of the search warrants used in making the arrests.

Despite the seeming relevance of the source, the court would not apply the "narrow facts" of Branzburg. It pointed out that the information sought involved a matter collateral to the criminal act, and, citing Mr. Justice Powell in Branzburg, held:

> The information sought would not be of sufficient probative value or relevancy to warrant compelling the testimony sought here.

[368 N.Y.S. 2d at 692. See also State v. Morgan, 337 So. 2d 951 (Fla. 1976).]

Even in those few criminal and quasi-criminal cases where reporters have been held in contempt for protecting confidential news sources, the courts imposing the contempt judgments have emphasized the "balancing test" factors outlined in Branzburg. E.g., People v. Dan, 342 N.Y.S. 2d 731 (1973) (reporter eyewitness to inmate deaths during Attica prison riot); Rosato v. Superior Court of Fresno County, 51 Cal.App. 3d 190 (1975), cert. denied, 427 U.S. 912 (1976) (reporter eyewitnesses to violation of grand jury secrecy); Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975), cert. denied,427 U.S. 912 (1976); Farr v. Superior Court, 22 Cal. App. 3d 59, 99 Cal. Rptr. 342 (2d Dist. 1971); In re Farr, 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (2d Dist. 1974) (reporter eyewitness to violation of court-issued gag order on attorneys).

In all three cases, the state courts emphasized that important state interests in the administration of justice were involved, that the reporters were eyewitnesses, and that no alternative witnesses were readily available.

C. Balancing Test: Criminal Case - Federal

The only United States Court of Appeals to have extensively discussed Branzburg established a "substantial connection" "balancing test" which it read to follow the "compelling state interest" test enunciated in DeGregory, Gibson, and Bates. See page 24, infra.

In Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972), a federal grand jury moved to compel staff reporters of the Black Panther newspaper to give testimony regarding the newspaper's published account of a speech containing an alleged presidential assassination threat.

The Court of Appeals reversed the District

Court and refused to compel testimony, citing First Amendment freedom of press and political association grounds. On petition for rehearing, the court affirmed its holding en banc in light of Branzburg.

The court found that Mr. Justice White's opinion followed the balancing standards enunciated in DeGregory v. Attorney of New Hampshire, 383 U.S. 825 (1966), Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539, and Bates v. Little Rock, 361 U.S. 516 (1960). Hence, the court said, the grand jury was required to establish that there was a "substantial connection" between the information sought and the criminal conduct which the government was investigating before a witness could be compelled to answer questions which divulged the identity of persons. [466 F.2d at 1091.]

D. Balancing Test: Civil Cases

The first important recent federal or state case in which a newsperson was subpoenaed to testify in civil litigation was Garland v. Torre, 259 F.2d 545 (2d Cir.) cert. denied, 358 U.S. 910 (1958). This case, which involved an effort to force a news reporter to disclose the source of unfavorable information about the late Judy Garland, established the "balancing test" which has been followed by all federal and most state courts which have dealt with this issue.

Mr. Justice Stewart, then a member of the Court of Appeals, said that each demand for confidential news sources presents the courts with the "delicate and difficult task" of determining whether forced disclosure of confidential information "justifies some impairment of the First Amendment protection" 259 F.2d at 548. The factors that Mr. Justice Stewart relied upon were the relevancy and materiality of the information, the lack of alternative sources of information and whether the information sought went to "the heart of" the plaintiff's case. Id. at 550.

In Baker v. F&F Investment Co., 470 F.2d 778 (2d Cir.), cert. denied, 411 U.S. 966 (1972). a class action was filed under the Civil Rights Acts alleging racial discrimination in the sale of houses in Chicago. Plaintiffs moved for an order compelling disclosure of a journalist's confidential news source during pretrial discovery.

The court recognized the constitutional interest of the journalist, pointing out:

> [T]hough a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest (where First Amendment rights must yield), we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential source outweighs the public and private interest in compelled testimony. [470 F.2d at 783.]

In upholding the District Court's denial of the motion, the Court of Appeals found that disclosure by the journalist of his source was not essential to protect the public interest in the orderly administration of justice in the courts, nor did the source's identity go to the heart of the appellant's case. Further, the court said that there were other available sources of information which appellants had not exhausted.

Other civil cases which have recognized the Garland, Branzburg, and Baker "balancing test" in determining whether confidential news sources should be disclosed are Apicella v. McNeil Laboratories, 66 F.R.D. 78 (E.D.N.Y. 1975) (disclosure refused because information sought was relevant but not essential to movant's case); Gilbert v. Allied Chemical, 411 F.Supp. 505 (E.D.Va. 1976) (disclosure refused because information sought was "helpful" but not "crucial", and movant could not show "compelling circumstances"); and Poirier v. Carson, 537 F.2d 823 (5th Cir. 1976) (disclosure

refused because information sought was not essential to the cause of action against reporter-party). See Loadholtz v. Fields, supra; Democratic National Committee v. McCord, supra; United States v. Steelhammer, supra; United States v. Liddy, 354 F.Supp. 208 (D.D.C. 1972); Altemose Construction v. Trades Council, No. 73-773 (E.D.Pa., May 16, 1977); Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388 (N.D. Cal. 1976).

E. Balancing Test: Libel Cases

It should be of particular interest to this Court to note that libel case decisions have followed the "balancing test" approach.

As pointed out earlier, the test was initially put forth in Garland v. Torre, supra, and has been applied in both granting and denying requests for forced disclosure of confidential news sources.

Carey v. Hume, supra, involved an accusation based upon information from a confidential source that the plaintiff had improperly removed documents from a union office.

The Court of Appeals for the District of Columbia adopted the "balancing" approach set forth in Garland v. Torre, 492 F.2d at 636. It found that the attempt to determine the source of the statement -- a supposed eyewitness -- went to the heart of the plaintiff's case. Therefore, the court said, the First Amendment considerations were outweighed, but only because the libel arose solely from the confidential source's statement and because there was no way for the plaintiff to know where to locate alternative sources.

A similar approach was taken in Cervantes v. Time, 464 F.2d 986 (8th Cir.), cert. denied, 409 U.S. 1125 (1972). This was a libel action brought by the mayor of St. Louis against the publisher of Life Magazine. The mayor subpoenaed a reporter, seeking the names of confidential news sources

quoted as linking the mayor with organized crime. The Court of Appeals refused to permit forced disclosure of the confidential source. It held that the First Amendment does not grant reporters an absolute privilege to withhold news sources, but that to routinely grant a motion seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would compromise the principles that underlay the line of cases articulating the constitutional basis for a modified privilege. [464 F.2d at 993.]

The two instances of state appellate courts refusing to recognize the "balancing test" enunciated by Garland v. Torre in libel cases are the Idaho Supreme Court in this case and the Supreme Judicial Court of Massachusetts in Dow Jones & Company, Inc. v. Superior Court, 303 N.E. 2d 847 (Mass. 1973).

F. Conclusion

It is the contention of the Amicus that the great weight of constitutional authority clearly establishes the "balancing test" as an essential protection for newsgathering under the First Amendment.

At the least, the conflict that has developed in case law between the United States Courts of Appeals and the Idaho and Massachusetts Supreme Courts requires this Court's review so that news organizations, in attempting to assess their First Amendment rights, will have some guidance.

III. GRANTING A PUBLIC FIGURE LIBEL PLAINTIFF THE RIGHT TO AUTOMATIC PRE-TRIAL DISCLOSURE OF CONFIDENTIAL NEWS SOURCES UNDERMINES THE FIRST AMENDMENT PROTECTION FOR NEWS REPORTING ON GOVERNMENT AS ESTABLISHED BY NEW YORK TIMES V. SULLIVAN AND GERTZ V. ROBERT WELCH, INC.

It is clear that granting a public figure libel plaintiff a virtually irrebuttable right to force disclosure of confidential news sources eviscerates this Court's protection for news reporting and comment on government as laid down in New York Times v. Sullivan, 376 U.S. 254 (1964), and succeeding cases. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

The New York Times doctrine is founded upon "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that it may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270.

Therefore, the New York Times doctrine creates a "balancing test" to protect reporting about government by requiring the public official libel plaintiff to show that the article was both false and done with reckless disregard for the truth.

This standard protects the news organization's ability to publish news by disallowing heavy financial damages resulting from frivolous libel suits.

But money awards are not the only type of damage which can burden First Amendment rights by leading "to intolerable self censorship." 418 U.S. 323 at 340 (1974). This Court has long held that forced disclosure of certain types of confidential information can impose an impermissible burden on the exercise of First Amendment rights. NAACP v. Button, 371 U.S. 415 (1963).

In that case, the NAACP argued that its First Amendment rights to freedom of political association were of little use if the government could obtain the names of its members, opening those members to the potentiality of harrassment and intimidation because of their association with the civil rights movement. Here we have a similar situation. A former government official is seeking the name of a confidential government news source, a disclosure which may open the source to harrassment and stop any further cooperation in providing news to the news organization defendant.

This Court must realize -- if only from the confidential source information provided in Watergate -- that its goal of encouraging news and comment about government under New York Times will be severely damaged by the approach taken by the Idaho Supreme Court. Amicus urges this Court to consider the consequences of offering virtually automatic disclosure of confidential news sources in libel cases without imposing any "balancing test" burden on the public figure libel plaintiff.

The result will be to encourage every person identified in an unfavorable light by a confidential news source to file a claim of libel and then automatically obtain pre-trial discovery of the confidential news source without any further showing of the reasonableness of the libel claim.

Under the Idaho Supreme Court ruling, the most frivolous libel claim will be permitted to force disclosure of confidential news sources, authorizing the same type of "strict liability" on the news-gathering process before trial as the New York Times rule prohibits during the trial.

IV. THERE IS NO PRESUMPTION OF "COMPELLING INTEREST" BY A PUBLIC FIGURE LIBEL PLAINTIFF SEEKING CONFIDENTIAL NEWS SOURCES DURING PRE-TRIAL DISCOVERY BECAUSE THERE IS NO FEDERAL OR STATE CONSTITUTIONAL OR COMMON LAW RIGHT TO PRE-TRIAL DISCOVERY.

The protection of confidential news sources under Branzburg v. Hayes and the protection against harrassment in libel cases under New York Times v. Sullivan are both rooted in the federal constitutional guarantee of freedom of the press. But the right of pre-trial discovery has no federal or state constitutional or common law roots.

This precise question was taken up by the Vermont Supreme Court in State v. St. Peter, supra, a case involving an attempt to obtain confidential news sources during pre-trial discovery. It said:

> The right of discovery in Vermont is of great liberality and the law is the better for it, but it is not of constitutional dimension and has no common law equivalent. When it is confronted by policy considerations related to a constitutional privilege, a carefully considered modification in the light of both concerns is in order. [315 A.2d at 256.]

There is a federal Fourteenth Amendment right to due process in state civil trials, but this case has not reached the trial stage yet. The plaintiff here is pursuing a purely statutory discovery right that could be eliminated completely by the Idaho legislature.

Therefore, the state statutory interest at issue here is weak at best. In the proper circumstances, it can be defeated by the assertion of constitutional, common law and other statutory privileges such attorney-client, physician-patient, and priest-penitent -- and in Idaho even counselor-student. (Joint App. A at 6a.)

The news organization in this case is not seeking an absolute privilege. It is merely asking that the public figure libel plaintiff make some reasonable threshold showing that the libel claim has a reasonable expectation of success by offering reliable evidence indicating malice or recklessness and also that the information sought is absolutely essential to the case.

V. THE FIRST AMENDMENT REQUIRES THAT A PUBLIC FIGURE LIBEL PLAINTIFF MAKE A STRONG INITIAL SHOWING OF MALICE BEFORE BEING PERMITTED TO FORCE DISCLOSURE OF CONFIDENTIAL SOURCES BY DEFENDANT.

The Eighth Circuit Court of Appeals, in Cervantes v. Times, Inc., supra, dealt with the specific question of whether the mere filing of a libel suit gives rise to pre-trial forced disclosure of a confidential source. The Court of Appeals held "To routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would atterly emasculate"[the First Amendment]. Id. at 993, 993

In Cervantes, as noted above, the mayor of St. Louis sought the identities of FBI and Justice Department sources of an article tying him to the St. Louis underworld. Life magazine provided extensive affidavits and pre-trial testimony showing it had spent "countless hours" carefully collecting and documenting its data. Id. at 994.

The court found: "Quite apart from the tactics employed in collecting the data for the article, the mayor has wholly failed to demonstrate with convincing clarity that either defendant acted with knowing or reckless disregard of the truth" Id. at 992 . The court added: "We are aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources. But to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws" Id. at 992-3 .

In balancing the conflicting interests, the Cervantes court placed the burden upon plaintiff to present "persuasive evidence on the issue of malice.... substantial evidence tending to show that the defendant's published assertions are so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports.... Mere speculation or conjecture about the fruits of such examination simply will not suffice" Id. at 994 .

The court further found, based upon the record before it, "an inference that there was good reason for this belief" in the accuracy of the article Id. Thus, the First Amendment considerations were found to be weightier than the need for disclosure. Defendant's showing of care prevailed over plaintiff's bare pre-trial discovery request.

Cases both before and after Cervantes have required a threshold showing of necessity before requiring disclosure of confidential news sources. The leading case is Garland v. Torre, supra.

In Carey v. Hume, supra, a United Mine Workers lawyer was accused by a confidential source of stealing union documents. The lawyer denied the truth of the article. Defendant, reporter Britt Hume, produced no evidence of care, and no alternative sources were available. Absent a showing of care, and given that plaintiff would

have difficulty in proving "that he did not, at any time of day or night over an indefinite period of several weeks, remove boxfuls of documents from the UMW offices" (id. at 637), the information sought was found by the Court of Appeals to be critical to plaintiff's case,and disclosure was ordered.

In Hemingway v. Fritz, 96 Idaho 364, 529 P.2d 364 (1974), an informant at the Fish and Game Commission was the source of information that a public official had allegedly misused privileged information for personal profit. The Idaho Supreme Court found: "It is not clear from reading the supposedly libelous items that a material, false, defamatory statement has been made,... Political epithets and hyperbole leveled against the actions of a public official are within the freedom of expression protected by the First Amendment" Id. at 265-6 . The court dismissed the anonymous informant issue: "Whether such an informant actually existed, what he told Fritz, and how he obtained his information would be of importance if the article were false ....Summary judgment will not be set aside for failure to answer irrelevant interrogatories." Id. at 266 .

For the minority view on this question, see Dow Jones, Inc. v. Superior Court, supra, where the Massachusetts Supreme Judicial Court ruled there was no First Amendment interest in protecting confidential news sources and therefore specifically rejected the threshold showing of "probable merits" as laid down in Cervantes.

A. Threshold Requirements: Summary Judgment and Confidential News Sources.

The requirement that a public figure libel plaintiff make a strong threshold showing of malice in requesting disclosure of confidential news sources is based on the same First Amendment pro-

cedural considerations as the requirement that the libel plaintiff make a strong threshold showing in opposing motions for summary judgment.

Summary judgment is a procedural device to protect the news organization from the financial and First Amendment damage that would result in the perpetuation of a libel case which has no merit on its face. Therefore, the courts have imposed an evidentiary standard requiring the plaintiff to make some showing of the validity of the claim in opposing summary judgment motions.

The identical constitutional interest is involved here, when prior to summary judgment the news organization seeks to protect its First Amendment rights faced with demand for confidential news sources. Without some such protective threshold rule for confidential news sources as in summary judgment motions, the news organization is naked in its effort to raise the First Amendment defense.

The District Court in Meeropol v. Nizer, 381 F.Supp. 29 (S.D.N.Y.), aff'd,505 F.2d 232 (1974), rehearing denied, 508 F.2d 837 (1975), said: "Summary judgment is particularly appropriate at an early stage in cases where claims of libel or invasion of privacy are made against publications dealing with matters of public interest or concern... Plaintiffs cannot defeat the motion for summary judgment by asserting that there is an issue for the jury as to malice unless they make some showing ... from which malice may be inferred" Id. at 32 .

In Time, Inc. v. McLaney, 406 F.2d 565 (5th Cir.), cert. denied,495 U.S. 922 (1969), the court, in reversing a denial of summary judgment, said: "The subject matter of this litiga-

tion, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category. This follows when the trial court and this Court jointly consider that the failure to dismiss a libel suit might necessitate long and expensive trial proceedings which ... would themselves offend the principles enunciated in Dombrowski v. Pfister (citations omitted) because of the chilling effect of such litigation." Id. at 566.

The court in Cervantes said: "Summary judgment ... is an extreme remedy ... but its extreme nature does not lighten the burden of a party against whom a motion therefore is interposed." 464 F.2d at 993 . The court further said, citing Konigsberg v. Time, Inc., 312 F.Supp. 848(S.D.N.Y. 1970) and Cerrito v. Time, Inc., 302 F.Supp. 1071, aff'd per curiam, 449 F.2d 303 (1971): "...a libel defendant's refusal to reveal the identity of its news sources need not bar the entry of summary judgment in its favor. Implicit in each of these cases is tacit approval of the contention that the free flow of news obtainable only from anonymous sources is likely to be deterred absent complete confidentiality." 464 F.2d at 992 n.9.

It is interesting to note that one of the many recent state libel cases requiring the threshold showing by the plaintiff in a summary judgment motion was handed down by the Idaho Supreme Court several weeks after the decision in this case.

Thus, in Bandelin v. Pietsch, 563 P.2d 395 (Idaho, 1977) the Idaho Supreme Court said: "Unless there is evidence which if believed by a jury would establish malice clearly and convincingly, a defendant is entitled to summary judgment" Id. at 399 .

VI. THE DEFENDANT NEWS ORGANIZATION AND NEWS REPORTER HAVE MADE A STRONG AND UNREBUTTED SHOWING OF REASONABLE JOURNALISTIC CARE WHICH SHOULD DEFEAT THE REQUEST FOR CONFIDENTIAL NEWS SOURCES.

Even the most cursory examination of the article in question (see A. App. A) and the deposition of the news reporter (see A. App. B) shows that the evidence submitted to the trial court on its face clearly raises a strong presumption that the article was written with care and not recklessly or maliciously.

The gist of the plaintiff's case is based partly on the conclusory statement by the unnamed police expert that the plaintiff narcotics agent's "justification for shooting didn't add up." See A. App. A.

A. Good Faith Reliance on Officials or Acknowledged Experts.

It is the contention of the appellants and the Amicus that the use of this statement was careful journalism under the New York Times rules because -- as the article pointed out -- this statement was corroborated by the State Attorney General, and the County Prosecutor (and also by the only eyewitnesses who were third-party strangers to the incident, unconnected to either the plaintiff or the victim).

The State Attorney General was quoted in the article as saying that the shooting was a "mistake" and that in all likelihood Caldero "got a little shook up."

The article quoted the County Prosecutor, who was familiar with the case, including records not available to the newspaper, that "knowing Dale [Johnson] I don't feel he is the sort who would try to run down a person. He just wanted out of there."

One eyewitness was quoted as saying that "he [Caldero] just ran up to the car and pumped three shots through the windshield." A second eyewitness was quoted as saying that at no time was Caldero in danger of being run down. Therefore, two acknowledged law enforcement officials and two eyewitnesses corroborated the conclusion of the unnamed police expert.

It is the position of the Amicus, based on the case law in this field, that there is a strong presumption of journalistic care raised by good faith reliance on public officials or known experts.

In Walker v. Cahalan, 542 F.2d 681 (6th Cir. 1976), The Detroit News published a letter from the State Attorney General to the legislature calling the plaintiff a "murderer", even though the murder conviction had been reversed. The Court of Appeals held that reliance by the newspaper on the state official was not reckless because of his "familiarity" with the case and because the newspaper "had no indication that the contents of the letter were in any respect untrue." Id. at 684.

In Time, Inc. v. McLaney, supra, defendant Life magazine called a public figure a "gambler", relying on a named official of Department of Justice. The court held that on its face this reliance was careful journalism because "in this case there is a complete absence of any indication that the writer of the article had any suspicion of the falsity of the statements made" to him by the Department of Justice official. Id. at 573. Therefore, the court placed the burden upon the plaintiff to show affirmatively some evidence of malice.

Similar holdings have come down from courts dealing with the question of newspapers relying

on an acknowledged expert. In Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977), Doubleday & Co. relied on a Spanish author who was an expert on Ernest Hemingway in publishing an unfavorable comment about another Hemingway expert who was an American. Pointing out that the book publisher exercised a reasonably careful judgment in relying on the Spanish Hemingway expert, the court granted summary judgment, holding: "Where there are no convicing indicia of unreliability, publication of the passage cannot constitute reckless disregard for the truth", Id. at 914. See also Fadell v. Minneapolis Star and Tribune, 425 F.Supp. 1075 (1976), aff'd ___F.2d___ [No. 77-1126 (7th Cir. 1977)]

Edwards v. National Audubon Society, ___F.2d ___(2d Cir. 1977) (2 Med.L.Rptr.1849 ,May 25, 1977) arose when The New York Times quoted officials at the New York Audubon Society that certain scientists were paid "liars" for the pesticide industry. The court granted summary judgment in favor of the Times saying that the Times had raised a strong presumption of care because it relied upon a "responsible prominent organization". 2 Med.L.Rptr. at 1853.

Therefore, we submit, reliance on official statements has raised a strong presumption of journalistic care which requires the public figure plaintiff to make some showing of malice before being granted the right to obtain the identity of confidential news sources in this case.

VII. ADDITIONAL EVIDENCE RAISING A STRONG PRESUMPTION OF JOURNALISTIC CARE BY THE NEWS REPORTER AND NEWS ORGANIZATION WAS UNREBUTTED BY THE PLAINTIFF.

This article was part of a six-part series published over a period of six months about the State Bureau of Narcoties and Organized Crime, a news issue which won an award as the most significant news event of the year.

The general conclusion of the articles was that agents were poorly trained and that there was poor management.

This conclusion was subsequently confirmed by two separate studies, one by LEAA and one by the Colorado Bureau of Investigation.

The news reporter interviewed 12 persons which included eyewitnesses, law enforcement officials, the victim, friends and family of the victim and the victim's attorney. (See A. Apps. B, C.) He obtained the permission of the State Attorney General and the local prosecutor to interview Caldero but, after waiting for more than two weeks, Caldero declined to be interviewed on the orders of this superior. (See A. App. B.) He gained limited access to some police reports, but many of the reports were denied to him.

Subsequently, Caldero was discharged from the agency, based primarily on the reports of the LEAA and the Colorado bureau which, in turn, reached the same conclusions as the newspaper articles.

In fact, the trial judge said that he was inclined to grant summary judgment were it not for the pendency of the pre-trial subpoena against the news reporter. Rp. Tr. 6, L.1-22; Joint App., p. 4a.

In addition, there does not appear to be any evidence alluded to in the plaintiff's motion for summary judgment raising any issue of malice or recklessness based on the investigation or writing of the article.

It is difficult for this Amicus to see how a small local newspaper, with limited resources, could have exercised more care than was exercised in the research and writing of this article.

CONCLUSION

WHEREFORE, the Amicus prays this Court to grant the petition for certiorari and to reverse the decision of the Idaho Supreme Court as violative of the First Amendment doctrines in Branzburg v. Hayes, Garland v. Torre and New York Times v. Sullivan;

Respectfully submitted,

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